No. 91-611

Supreme Court, U.S.
FILED
OCT 10 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

KEYTON E. BARKER and
PAULINE BARKER, et al.,

Petitioners,

vs.

STATE OF KANSAS; KANSAS DEPARTMENT OF REVENUE; SECRETARY OF REVENUE OF THE STATE OF KANSAS; and DIRECTOR OF TAXATION OF THE STATE OF KANSAS,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Kansas

PETITION FOR WRIT OF CERTIORARI

JOHN C. FRIEDEN
KEVIN M. FOWLER*
FRIEDEN, HAYNES & FORBES
400 S.W. 8th, Suite 409
Topeka, KS 66603
(913) 232-7266

* *Counsel of Record*

TERENCE A. LOBER
DAVIS, BEALL, MCGUIRE & THOMPSON, CHARTERED
117 Cherokee Street
Leavenworth, KS 66048
(913) 682-3822

KENTON C. GRANGER
ANGELA K. GREEN
NIEWALD, WALDECK & BROWN, P.C.
9401 Indian Creek Parkway
Corporate Woods,
Building 40, Suite 550
Overland Park, KS 66225
(913) 451-1717

ROGER M. THEIS
9411 Shannon Way Court
Wichita, KS 67206
(316) 634-0418

Counsel For Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

WHETHER THE KANSAS INCOME TAX ACT VIOLATES CONSTITUTIONAL OR STATUTORY PRINCIPLES OF INTERGOVERNMENTAL TAX IMMUNITY, AS RECENTLY APPLIED IN *DAVIS v. MICHIGAN DEPT. OF TREASURY*, 489 U.S. 803 (1989), BY FAVORING RETIRED STATE AND LOCAL EMPLOYEES OVER RETIRED MEMBERS OF THE UNITED STATES ARMED FORCES.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Kansas Supreme Court were: (1) Petitioners Keyton Barker and Pauline Barker; William Richards, Sr. and Ollun E. Richards; Andrew J. Peele; Clarence Wolf and Flora B. Wolf; John G. Fowler and Carol B. Fowler; Leonard W. Williams and Loneta S. Williams; Anthony E. Corcoran; William J. Lober, Jr. and Marjorie E. Lober; Roger W. Clay and Betty J. Clay; Roger J. Olson and Nancy W. Olson; Leland W. Keister, Jr. and Patricia K. Keister; and Edward F. Kellogg and Renata O. Kellogg, for themselves and all others similarly situated;* and (2) Respondents State of Kansas; Kansas Department of Revenue; Secretary of Revenue of the State of Kansas; and Director of Taxation of the State of Kansas.

---

* Petitioners and their counsel were designated by the district court to represent a certified plaintiff class which consists of approximately 14,000 federal military retirees [and, where applicable, their joint taxpayer spouses] who have been subject to Kansas state income taxation during one or more tax years from 1984 through 1989. *See* Record at 781-782, 784-785 and 1990, *Barker* (Dist. Ct. Case No. 89-CV-666). Petitioners were Appellants in the proceedings before the Kansas Supreme Court.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
OPINIONS DELIVERED BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR ALLOWING THE WRIT	5
I. THE FEDERAL QUESTION PRESENTED SHOULD BE RESOLVED BY THIS COURT TO PROVIDE AUTHORITATIVE GUIDANCE TO ALL STATES OF THE UNION	6
A. The Opinion Below Directly Conflicts With Decisions of Other State Courts of Last Resort	6
B. Review by This Court on Writ of Certiorari Is Necessary to Resolve Existing Conflict Among the States and to Avoid Further Conflicting Decisions	7
II. THE DECISION BELOW CONFLICTS WITH CONTROLLING PRINCIPLES OF INTERGOVERNMENTAL TAX IMMUNITY RECENTLY REITERATED IN *DAVIS v. MICHIGAN DEPT. OF TREASURY*, 489 U.S. 803 (1989)	10
A. All Government Retirees Are Similarly Situated For Purposes of Taxation and "Presumably Should be Taxed Alike."	12
B. The Kansas Tax Scheme Is Substantially Similar to the Michigan Scheme Invalidated in *Davis*	14

TABLE OF CONTENTS – Continued

Page

C. Differential Taxation of Federal Military Retirees Is Not "Directly Related to" Any Significant Differences Between the Classes of Favored and Disfavored Government Retirees 18

D. Differential Taxation of Federal Military Retirees Is Not "Justified By" Any Significant Differences Between the Classes of Favored and Disfavored Government Retirees 27

CONCLUSION 30

APPENDIX A 1a

APPENDIX B 36a

APPENDIX C 47a

TABLE OF AUTHORITIES

Page

CASES

Barto v. Collins, No. D86354 (Super. Ct. Fulton Cty., Georgia) 9

Bohn v. Waddell, 164 Ariz. 74, 790 P.2d 772 (T.C. 1990), *aff'd on reconsideration*, 82 Ariz. Adv. Rep. 52, 807 P.2d 1 (T.C. 1991), *appeal docketed*, No. 1 CA-TX 90-029 (Ariz. App. 1991) 8

Cady v. Cady, 224 Kan. 339, 581 P.2d 358 (1978) 25

Cornetta v. United States, 851 F.2d 1372 (Fed.Cir. 1987) 26

Davis v. Michigan Dept. of Treasury, 489 U.S. 803 (Mar. 28, 1989) ..... *passim*

Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100 (1981) 8

Hackman v. Director of Revenue, 771 P.2d 77 (Mo. 1989) (*en banc*), *cert. denied*, 110 S.Ct. 718 (1990) ...6, 7

Harper v. Virginia Dept. of Taxation, 241 Va. 232, 401 S.E.2d 868, *vacated and remanded*, ___ U.S. ___, 59 U.S.L.W. 3772 (1991), *on remand* (Nos. 900770 and 900792, Va., argued Sept. 17, 1991) 8

Hogan v. Musolf, 157 Wis.2d 362, 459 N.W.2d 865 (Wis.App. 1990), *rev'd* ___ Wis.2d ___, 471 N.W.2d 216 (wis. 1991), *petition for cert. filed*, 60 U.S.L.W. 3173 (U.S., Sept. 5, 1991) (No. 91-380) 9

Krueger v. Collins, No. D92445 (Super. Ct. Fulton Cty., Georgia) 9

TABLE OF AUTHORITIES – Continued

Page

Kuhn v. State of Colorado, ___ Colo. ___, ___ P.2d ___ (Nos. 90-SA-299 and 90-SA-300, filed Sept. 16, 1991) (*en banc*) [WESTLAW, 1991 WL 179971] 6, 7, 27

Mansell v. Mansell, 490 U.S. 581 (1989) 13

Marx v. Winstead, No. 141, 652 (Chanc. Ct. Hinds Cty., Miss., Feb. 7, 1991), *appeal docketed*, No. 91-CC-0475 (Miss. 1991) 8

McCarty v. McCarty, 453 U.S. 210 (1981) 25

McKesson Corp. v. Florida Alcohol & Tobacco Div., 110 S.Ct. 2238 (1990) 8

Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984) 8

Phillips Chemical Co. v. Dumas Independent School Dist., 361 U.S. 376 (1960) ..... *passim*

Pledger v. Bosnick, 306 Ark. 45, 811 S.W.2d 286 (June 10, 1991), *petition for cert. filed*, 60 U.S.L.W. 3173 (U.S., Sept. 3, 1991) (No. 91-375) 6, 7

Ponthier v. Broussard, No. 344,035 (Dist. Ct., Parish of East Baton Rouge, La., Sept. 12, 1991) 9

Redmond v. Redmond, 229 Kan. 565, 626 P.2d 142 (1981) 25

Tradesmens Nat. Bank of Oklahoma City v. Oklahoma Tax Commission, 309 U.S. 560 (1940) 11

United States v. Tafoya, 803 F.2d 140 (5th Cir. 1986) 26

Wachholz v. Wachholz, 4 Kan.App.2d 161, 603 P.2d 647 (1979) 24, 25

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const., art. VI, cl. 2 2

4 U.S.C. § 111 ..... *passim*

5 U.S.C.A. § 8331 *et seq.* (West 1980 and Supp. 1991) 20

5 U.S.C.A. § 8336 (West 1980 and Supp. 1991) 13

5 U.S.C.A. § 8336(c)(1) (West 1980) 13

5 U.S.C.A. § 8401 *et seq.* (West Supp. 1991) 20

10 U.S.C.A. § 1401 (West 1983 and Supp. 1991) 13

10 U.S.C.A. § 1406 (West 1983 and Supp. 1991) 13

10 U.S.C.A. § 1407 (West 1983 and Supp. 1991) 13

22 U.S.C.A. § 4041 *et seq.* (West 1990 and Supp. 1991) 16

26 U.S.C. § 61(a) (1988) 23, 28

26 U.S.C.A. § 219 (West Supp. 1991) 23, 28

26 U.S.C.A. §§ 3121(a)(5), (i)(2), (m) and (v)(3) (West Supp. 1991) 28

28 U.S.C.A. § 178 (West Supp. 1991) 16, 20

28 U.S.C.A. § 371 (West 1968 and Supp. 1991) 16

28 U.S.C.A. § 377 (West Supp. 1991) 17, 20

28 U.S.C. § 1341 8

33 U.S.C.A. § 853o (West 1986 and Supp. 1991) 16

42 U.S.C.A. § 212 (West 1991) 16

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C.A. §§ 403(b) and (f)(5)(A) and (f)(5)(C)(i) (West 1983 and Supp. 1991) 28

50 U.S.C.A. § 403 note (West 1991) (Central Intelligence Agency Retirement and Disability Act of 1964 for Certain Persons, Pub. L. 88-643, 78 Stat. 1043 (Oct. 13, 1964)) 16, 20, 21

Ala. Code § 40-18-20(d) (Supp. 1990) 9

Ariz.Rev.Stat.Ann. § 43-1022(3) (Supp. 1990) 9

Ark. Code Ann. §§ 26-51-306 and 26-51-307 (Michie Supp. 1991) 9

Colo.Rev.Stat. § 39-22-104(f) (Supp. 1990) 9

Ga. Code Ann. § 48-7-27(a)(4) and (5) (Supp. 1991) 9

Iowa Code Ann. § 422.7.18 (West 1990) 9

1987 Kan.Sess.Laws, ch. 120, § 1 25

Kan.Stat.Ann. § 12-5005 (Supp. 1990) 15

Kan.Stat.Ann. § 12-111a (Supp. 1990) 15

Kan.Stat.Ann. § 13-14a10 15

Kan.Stat.Ann. § 14-10a10 15

Kan.Stat.Ann. § 20-3017 5

Kan.Stat.Ann. § 20-2618 (Supp. 1990) 15

Kan.Stat.Ann. § 23-201(b) (1988) 24, 25

Kan.Stat.Ann. § 79-32,117(c) (Supp. 1990) ..... *passim*

Kan.Stat.Ann. § 72-1768a 15

Kan.Stat.Ann. § 72-17,122 15

Kan.Stat.Ann. § 74-4901 (1985) 29

TABLE OF AUTHORITIES – Continued

Page

Kan.Stat.Ann. § 74-4914(1) (Supp. 1990) 14

Kan.Stat.Ann. § 74-4915(1) (Supp. 1990) 14

Kan.Stat.Ann. § 74-4919h(1) (Supp. 1990) 24, 26

Kan.Stat.Ann. § 74-4923(b) (Supp. 1990) 15, 22

Kan.Stat.Ann. § 74-4925(1) and (4) (Supp. 1990) 22

Kan.Stat.Ann. § 74-4955a(1) (Supp. 1990) 14

Kan.Stat.Ann. § 74-4957a(1) (Supp. 1990) 14

Kan.Stat.Ann. § 74-4957(1) and (3) (Supp. 1990) 14

Kan.Stat.Ann. § 74-4958(1) (Supp. 1990) 14

Kan.Stat.Ann. § 74-4978g (Supp. 1990)..... 15

Kan.Stat.Ann. § 74-49,105 15

Kan.Stat.Ann. § 79-3201 *et seq.* ..... *passim*

Kan.Stat.Ann. § 79-32,116 15

La.Rev. Stat.Ann. § 47:44.2 (West Supp. 1990)..... 9

Mich.Comp.Laws Ann. § 206.30(1)(f) (Supp. 1988) 22

Mich.Stat.Ann. § 7.557(130) (e) and (f) (Callaghan Supp. 1990) 9

Miss. Code Ann. § 27-7-15(k) and (l) (Law. Coop. Supp. 1990) 9

Mo.Ann.Stat. § 143.124 (Vernon Supp. 1991)..... 9

Mont. Code Ann. § 15-30-111(2)(c) (1991)..... 9

N.C.Gen.Stat. § 135-9 (Supp. 1990) 10

N.M.Stat.Ann. § 10-11-135 (Repl. Pam. 1990) 9

TABLE OF AUTHORITIES – Continued

Page

N.Y. Tax Law § 612(c)(3) (McKinney 1991) 10

Okl.Stat.Ann. tit. 68 § 2358D(9) (West Supp. 1991) 10

Ore.Rev. Stat.Ann. § 316.680(1)(c) (1990)..... 10

Utah Code Ann. § 59-10-114(2)(d) and 3(a) (Supp. 1991)..... 10

Va.Code Ann. § 58.1-322(C)(13) (Supp. 1991) [repealed 1990]..... 10

Wis.Stat.Ann. § 71.05(1)(a) (West Supp. 1990)..... 10

REGULATIONS

Kan. Admin. Regs. 80-3-16 (1989) 24, 26

OTHER AUTHORITIES

Department of Defense, ATLAS/DATA ABSTRACT FOR THE UNITED STATES AND SELECTED AREAS – Fiscal Year 1989, at 8 (1990)..... 10

Department of Defense, SELECTED MANPOWER STATISTICS – Fiscal Year 1989, at 163 and 196 (1990)..... 10

REPORT OF SPECIAL COMMITTEES TO THE 1974 KANSAS LEGISLATURE, RE: PROPOSAL NO. 22 – RETIREMENT MATTERS, 22-13 (1974) 24

No. _____

In The

Supreme Court of the United States

October Term, 1991

KEYTON E. BARKER and
PAULINE BARKER, et al.,

Petitioners,

vs.

STATE OF KANSAS; KANSAS DEPARTMENT OF REVENUE; SECRETARY OF REVENUE OF THE STATE OF KANSAS; and DIRECTOR OF TAXATION OF THE STATE OF KANSAS,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Kansas

PETITION FOR WRIT OF CERTIORARI

Petitioners, on behalf of themselves and all others similarly situated, respectfully petition this Court for a writ of certiorari to the Supreme Court of the State of Kansas.

OPINIONS DELIVERED BELOW

The opinion of the Kansas Supreme Court [App. A, *infra* at 1a-35a] is reported at 249 Kan. 186, ___ P.2d ___ (1991). The Memorandum Decision and Order of the District Court of Shawnee County, Kansas [App. B, *infra* at 36a-46a] is unreported.

JURISDICTION

Petitioners seek review of a judgment entered by the Kansas Supreme Court on July 12, 1991 upholding the constitutionality of the Kansas Income Tax Act. App. A at 3a. This petition is filed within the 90-day period allowed by law and 28 U.S.C. § 1257(a) confers jurisdiction to review the judgment in question by writ of certiorari.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Supremacy Clause of the United States Constitution, Article VI, cl. 2 provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

4 U.S.C. § 111 provides in pertinent part:

> The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States . . . by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate

against the officer or employee because of the source of the pay or compensation.

In accordance with Sup. Ct. R. 14.1(f), the text of pertinent Kansas statutes and regulations is set forth in Appendix C, *infra* at 47a-60a.

STATEMENT OF THE CASE

On April 17, 1989, two class actions were filed in Kansas state court challenging the constitutionality of the Kansas Income Tax Act [Kan.Stat.Ann. § 79-3201 *et seq.* ("KITA")] under constitutional and statutory principles of intergovernmental tax immunity.[1] Record at 11-20, *Barker* (Dist. Ct. No. 89-CV-666); Record at 39-42, *Lober* (Dist. Ct. No. 89-CV-1100). These lawsuits were subsequently consolidated in the District Court of Shawnee County, Kansas and certified as a class action. Record at 783-85, *Barker* (Dist. Ct. No. 89-CV-666).[2]

Petitioners are retired members of the United States Armed Forces [and their joint taxpayer spouses] who have been and remain subject to Kansas income taxation of their federal military retired pay. They are also designated as representatives of a plaintiff class which consists of approximately 14,000 federal military retirees [and

---

[1] In *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (Mar. 28, 1989), this Court held that state income tax schemes which favor retired state and local employees over retired federal employees violate the constitutional doctrine of intergovernmental tax immunity and 4 U.S.C. § 111. *Id.* at 817.

[2] Under local practice, *Barker* became the lead case following consolidation. Therefore, all further citations to the record of proceedings below shall rely upon the *Barker* Record [hereinafter "R"].

their joint taxpayer spouses] subject to such taxation during one or more tax years from 1984 through 1989. R at 784; App. A at 6a. Because the retirement pay of all State and local government retirees is exempt from Kansas taxation under a statutory scheme which grants exemptions based upon the source of retirement compensation, Petitioners alleged that KITA's discriminatory exemption scheme violates federal principles of intergovernmental tax immunity by favoring retired state and local employees over retired members of the United States Armed Forces. R at 11-20, 21-30 and 310-325. Petitioners further alleged that all members of the plaintiff class are entitled to appropriate relief from such unconstitutional taxation in accordance with *Davis v. Michigan Dept. of Treasury, supra. Id.*

On February 23, 1990, Petitioners moved for summary judgment, contending in relevant part that KITA unconstitutionally discriminates against federal military retirees under principles of intergovernmental tax immunity, and 4 U.S.C. § 111 and the Supremacy Clause of the United States Constitution. R at 1003-10 and 1359-60. In opposition to this dispositive motion, Respondents argued that differential taxation of military retired pay under KITA is constitutional because it is directly related to and justified by substantial differences between the classes of retirees. R at 1437-68.

On October 31, 1990, the district court concluded that "there are substantial differences between the two classes which justifies the disparate tax treatment" of military retired pay under KITA. App. B at 43a. Because military retirees "are subject to recall" to active duty; military retirees "do not contribute to their retired pay"; and this Court has characterized military retired pay as "reduced

compensation for reduced current service," the district court held that "the Kansas Income Tax Act is not unconstitutional nor in violation of 4 U.S.C. § 111." App. B at 44a-45a. Petitioners' motion for summary judgment was accordingly denied, and the district court entered judgment *sua sponte* in favor of Respondents. App. B at 46a. Petitioners appealed. R at 2001-03.[3]

In a published decision filed July 12, 1991, the Kansas Supreme Court affirmed the district court's judgment and held that KITA is constitutional on the basis that differential taxation of military retirement benefits "is directly related to and justified by significant differences between the two classes of retirees." App. A at la and 3a. In support of its decision, the Kansas Supreme Court relied upon a "presumption of constitutionality" [App. A at 9a], "federal cases holding that military retirement pay is reduced compensation for reduced current services" [*Id.* at 30a], and the "noncontributory" nature of the military retirement system [*Id.* at 26a] to conclude that KITA satisfies the requirements of *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989). App. A at 1a, Syl. ¶ 2.

REASONS FOR ALLOWING THE WRIT

This case presents an important and recurring federal question with far-reaching impact: whether state income tax schemes that favor retired state and local government

[3] This case was later transferred from the Kansas Court of Appeals to the Kansas Supreme Court under the provisions of Kan. Stat. Ann. § 20-3017. App. A at 5a; *see also* Kansas Supreme Court Order (filed Nov. 19, 1990).

employees over federal military retirees violate the doctrine of intergovernmental tax immunity and 4 U.S.C. § 111. State courts of last resort have delivered conflicting opinions on this issue and further divergence is inevitable. Therefore, review on writ of certiorari is necessary to resolve existing conflict among the states and to ensure national uniformity in federal law. Such review is also necessary to enforce controlling principles of intergovernmental tax immunity.

I. THE FEDERAL QUESTION PRESENTED SHOULD BE RESOLVED BY THIS COURT TO PROVIDE AUTHORITATIVE GUIDANCE TO ALL STATES OF THE UNION

A. The Opinion Below Directly Conflicts With Decisions of Other State Courts of Last Resort.

The holding in this case that military retirees are not entitled to the same state income tax treatment as federal civil service retirees and state and local government retirees under *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989), directly conflicts with applicable decisions of the Colorado Supreme Court, Arkansas Supreme Court and Missouri Supreme Court. *See Kuhn v. State of Colorado*, ___ Colo. ___, ___ P.2d ___ (Nos. 90-SA-299 and 90-SA-300, filed Sept. 16, 1991) (*en banc*) [WESTLAW, 1991 WL 179971]; *Pledger v. Bosnick*, 306 Ark. 45, 811 S.W.2d 286 (June 10, 1991), *petition for cert. filed*, 60 U.S.L.W. 3173 (U.S., Sept. 3, 1991) (No. 91-375); and *Hackman v. Director of Revenue*, 771 P.2d 77 (Mo. 1989) (*en banc*), *cert. denied*, 110 S.Ct. 718 (1990). Relying upon controlling principles of federal law applied by this Court in *Davis*, the state courts of last resort in *Kuhn*, *Pledger* and *Hackman* each invalidated state income tax schemes which favored state

and local government retirees over federal military retirees.

The opinion below acknowledged the reasoning of *Pledger* and *Hackman* that "civil service retirees and military retirees should be treated alike" under 4 U.S.C. § 111 and *Davis*, but it expressly refused to follow those decisions. App. A at 33a. The Kansas Supreme Court, therefore, knowingly created a conflict between state courts of last resort on this important federal question which invites review on writ of certiorari.

This divergence of opinion was recently sharpened in light of the Colorado Supreme Court's *Kuhn* decision, which held that the Colorado income tax scheme in existence before *Davis* unconstitutionally discriminated between federal military retirees under age fifty-five and all other retirees under age fifty-five based upon the source of their retirement pay. *Kuhn*, ___ Colo. ___, 1991 WL 179971 at *6-7. In *Kuhn* a unanimous Colorado Supreme Court rejected the holding and rationale of the Kansas Supreme Court below and concluded that the characterization of military retired pay in "[s]everal federal cases dealing with nontax issues" as "current pay for reduced current services" does not directly relate to nor justify discriminatory state taxation of military retirement income. *Kuhn*, ___ Colo. ___, at 1991 WL 179971 at *4-7 and *8 n. 6.

B. Review by This Court on Writ of Certiorari Is Necessary to Resolve Existing Conflict Among the States and to Avoid Further Conflicting Decisions.

In view of constraints upon the jurisdiction of federal courts imposed by the Eleventh Amendment, the Tax

Injunction Act [28 U.S.C. § 1341] and considerations of comity, constitutional challenges to state taxes must ordinarily be pursued through state courts. *See, e.g., Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 122 (1984); *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 116 (1981). Consequently, the writ of certiorari from this Court is the only generally available means to resolve decisional conflicts between state supreme courts in state tax cases involving federally-protected rights. Review on writ of certiorari is, therefore, essential to resolve the existing conflict among state courts of last resort, and to ensure that federal protection from discriminatory income taxation will not depend upon the state residence of military retirees. *See McKesson Corp. v. Florida Alcohol & Tobacco Div.*, 110 S.Ct. 2238, 2245 (1990) [securing "state-court compliance with and national uniformity of federal law" are proper objectives of review].

Authoritative guidance from the Court is also necessary to avoid further state conflicts regarding the state tax treatment of military retirees. This important federal question is currently pending at the state appellate level in *Harper v. Virginia Dept. of Taxation*, 241 Va. 232, 401 S.E.2d 868, *vacated and remanded*, ___ U.S. ___, 59 U.S.L.W. 3772 (1991), *on remand* (Nos. 900770 and 900792, Va., argued Sept. 17, 1991); *Bohn v. Waddell*, 164 Ariz. 74, 790 P.2d 772, 780 (T.C. 1990), *aff'd on reconsideration*, 82 Ariz. Adv. Rep. 52, 807 P.2d 1 (T.C. 1991), *appeal docketed*, No. 1 CA-TX 90-029 (Ariz. App. 1991); and *Marx v. Winstead*, No. 141,652 (Chanc. Ct. Hinds Cty., Miss., Feb. 7, 1991), *appeal docketed*, No. 91-CC-0475 (Miss. 1991). The issue has also been raised in similar litigation at the trial court

level in Georgia and Louisiana,[4] and it may eventually be reached in *Hogan v. Musolf*, 157 Wis.2d 362, 459 N.W.2d 865 (Wis.App. 1990), rev'd ___ Wis.2d ___, 471 N.W.2d 216 (Wis. 1991), *petition for cert. filed*, 60 U.S.L.W. 3173 (U.S., Sept. 5, 1991) (No. 91-380).

If the opinion below is not reviewed, other state courts might be inclined to uphold discriminatory taxation of military retired pay despite constitutional principles of intergovernmental tax immunity and 4 U.S.C. § 111. Likewise, state legislatures which currently afford military retirees the same tax treatment as other public sector retirees might be induced to impose discriminatory taxes against military retirees in an effort to alleviate fiscal woes.[5] The impact of such action would be felt by

---

[4] *See Barto v. Collins*, No. D86354 (Super. Ct. Fulton Cty., Georgia) and *Krueger v. Collins*, No. D92445 (Super. Ct. Fulton Cty., Georgia); *Ponthier v. Broussard*, No. 344,035 (Dist. Ct., Parish of East Baton Rouge, La., Sept. 12, 1991) [refusing to follow the Kansas Supreme Court decision below and ruling that 4 U.S.C. § 111 "applies to federally derived compensation whether or not it is military or civil service"].

[5] After the announcement of *Davis*, at least 19 states passed remedial legislation to provide equal tax treatment for all federal retirees, including retired members of the United States Armed Forces. *See, e.g.*, Ala. Code § 40-18-20(d) (Supp. 1990); Ariz.Rev.Stat.Ann. § 43-1022(3) (Supp. 1990); Ark. Code Ann. §§ 26-51-306 and 26-51-307 (Michie Supp. 1991); Colo.Rev.Stat. § 39-22-104(f) (Supp. 1990); Ga. Code Ann. 48-7-27(a)(4) and (5) (Supp. 1991); Iowa Code Ann. 422.7.18 (West 1990); La.Rev.Stat.Ann. § 47:44.2 (West Supp. 1990); Mich.Stat.Ann. § 7.557(130) (e) and (f) (Callaghan Supp. 1990); Miss. Code Ann. § 27-7-15(k) and (1) (Law. Coop. Supp. 1990); Mo.Ann.Stat. § 143.124 (Vernon Supp. 1991); Mont. Code Ann. § 15-30-111(2)(c) (1991); N.M.Stat.Ann. § 10-11-135 (Repl. Pam.

(Continued on following page)

literally hundreds of thousands of retired military personnel who "earned" their entitlement to military retired pay through at least 20 years of honorable service to the United States. Since more than 1,179,000 "retired military annuitants" receive nondisability military retired pay of almost 20 billion dollars annually,[6] the potential nationwide impact of the Kansas Supreme Court's decision below is staggering.

II. THE DECISION BELOW CONFLICTS WITH CONTROLLING PRINCIPLES OF INTERGOVERNMENTAL TAX IMMUNITY RECENTLY REITERATED IN *DAVIS V. MICHIGAN DEPT. OF TREASURY*, 489 U.S. 803 (1989)

It is well settled that "a State may not single out those who deal with the [Federal] Government, in one capacity or another, for a tax burden not imposed on others similarly situated." *Phillips Chemical Co. v. Dumas Independent School Dist.*, 361 U.S. 376, 383 (1960). "[U]nder this test," it is first necessary to examine " 'the whole tax structure of the state' " in order "to determine how other taxpayers similarly situated are treated." *Id.* [quoting

---

(Continued from previous page)

1990); N.Y. Tax Law § 612(c)(3) (McKinney 1991); N.C.Gen.Stat. § 135-9 (Supp. 1990); Okl.Stat.Ann. tit. 68 § 2358D(9) (West Supp. 1991); Ore.Rev.Stat.Ann. § 316.680(1)(c) (1990); Utah Code Ann. § 59-10-114(2)(d) and 3(a) (Supp. 1991); Va.Code Ann. § 58.1-322(C)(13) (Supp. 1991) [repealed 1990]; Wis.Stat.Ann. § 71.05(1)(a) (West Supp. 1990).

[6] *See* Department of Defense, SELECTED MANPOWER STATISTICS – Fiscal Year 1989, at 163 and 196 (1990); Department of Defense, ATLAS/DATA ABSTRACT FOR THE UNITED STATES AND SELECTED AREAS – Fiscal Year 1989, at 8 (1990).

Tradesmens Nat. Bank of Oklahoma City v. Oklahoma Tax Commission, 309 U.S. 560, 568 (1940)]. Once this examination is complete, the Court emphasized in *Davis* that " '[t]he imposition of a heavier tax burden on [those who deal with one sovereign] than is imposed on [those who deal with the other] must be justified by significant differences between the two classes.' " 489 U.S. at 815 [quoting *Phillips Chemical Co.*, 361 U.S. at 383]. In evaluating whether this "standard of justification" is satisfied, however, the relevant inquiry is whether "the inconsistent tax treatment is directly related to *and* justified by 'significant differences between the two classes.' " *Davis*, 489 U.S. at 816 [quoting *Phillips Chemical Co.*, 361 U.S. at 383-385 (emphasis added)].

In *Davis*, this Court struck down a differential exemption scheme under the Michigan Income Tax Act which "violate[d] principles of intergovernmental tax immunity by favoring retired state and local government employees over retired federal employees." 489 U.S. at 817. Given the statutory manner in which Michigan exempted retirement income by source of compensation, the retirement benefits of retired state and local government employees were exempt from state taxation while the benefits received by retired federal employees were not. *Id.* at 806 and n.2. However, Congress unmistakably forbids state taxation which discriminates against retired federal officers or employees "because of the source of the pay or compensation." 4 U.S.C. 111. *See Davis*, 489 U.S. at 812. Reasoning that Michigan's tax system "discriminate[d] on the basis of the source of [retirement] benefits," and that "[t]he State's interest in adopting the discriminatory tax" cannot justify differential treatment, the Court concluded that Michigan's exemption scheme

offended controlling precepts of federal law. *Davis*, 489 U.S. at 816-817. This analysis is equally applicable here.

A. All Government Retirees Are Similarly Situated For Purposes of Taxation and "Presumably Should be Taxed Alike."

Despite the importance of determining whether federal, state and local government retirees are "similarly situated" for tax purposes, the opinion below does not directly address or resolve this initial issue. Instead, the Kansas Supreme Court erroneously viewed the threshold question of whether the classes are "similarly situated" as synonymous with the ultimate question of whether differential taxation is justified by "significant differences" between the classes. *See, e.g.*, App. A at 15a-17a. This mistaken interpretation, however, directly conflicts with the analytical framework applied in *Phillips Chemical Co.*, 361 U.S. at 381-385, and it disregards the presumption of equal taxation applicable in cases involving intergovernmental tax immunity. *Id.* at 381.

As a threshold matter, Petitioners submit that all retired officers or employees of the United States are "similarly situated" with state and local government retirees for purposes of the tax immunity doctrine. *See generally, Davis*, 489 U.S. at 815-817.[7] Upon retirement,

---

[7] This issue was not expressly addressed in *Davis*, but the decision cannot be read except as supporting the conclusion that retired federal employees are similarly situated with retired state and local government employees for purposes of 4 U.S.C. § 111 and principles of intergovernmental tax immunity. In addition to the holding in *Davis*, this Court observed that while the Public Salary Tax Act of 1939 "impose[d] federal

(Continued on following page)

each public officer or employee leaves active government service and receives nondisability retirement pay based on years of past service and highest qualifying rank or level of compensation attained.[8] All government retirees

---

(Continued from previous page)

income tax on the salaries of all state and local government employees," it also consented to the imposition of nondiscriminatory state taxes on the pay or compensation of all federal officers and employees. *Davis*, 489 U.S. at 810-812. By this simultaneous action, Congress plainly intended all federal, state and local government employees to be equally subject to the burdens of both federal and state income taxation. Therefore, members of the class of government retirees are similarly situated for tax purposes.

[8] "Members of the Armed Forces who serve for a specified period, generally at least 20 years, may retire with a pension. 10 U.S.C. § 3911 *et seq.* (Army) (1982 ed. and Supp. V); § 6321 *et seq.* (1982 ed. and Supp. V) (Navy and Marine Corps); § 8911 *et seq.* (1982 ed. and Supp. V) (Air Force). The amount of retirement pay a veteran is eligible to receive is calculated according to the number of years served and the rank achieved." *Mansell v. Mansell*, 490 U.S. 581, 583 (1989). *See* 10 U.S.C.A. §§ 1401, 1406 and 1407 (West 1983 and Supp. 1991).

Federal civil servants who meet certain combined age and years of service requirements may retire and immediately begin receiving retirement benefits. *See* 5 U.S.C.A. § 8336 (West 1980 and Supp. 1991). For example, federal employees who complete "20 years of service as a law enforcement officer or firefighter" may retire at 50 years of age with a full retirement annuity. 5 U.S.C.A. § 8336(c)(1) (West 1980). For all federal civil servants, "the amount of benefits received in retirement is based and computed upon the individual's salary and years of service. 5 USC § 8339(a) [5 USCS § 8339(a)]." *Davis*, 489 U.S. at 808. Other federal retirement systems for civilian employees of the United States not covered by the federal civil service retirement system also share these same features.

(Continued on following page)

are "similarly situated" since they share these common characteristics and *"presumably should be taxed alike."* *Phillips Chemical Co.*, 361 U.S. at 381 [emphasis added].

"Because 'the Government's interests must be weighed in the balance,' " the presumption that federal retirees are entitled to equal tax treatment places a substantial burden on state taxing authorities to establish that differential taxation is "directly related to and 'justified by significant differences' " between the favored and the disfavored classes of taxpayers. *Davis*, 489 U.S. at 815-817; *Phillips Chemical Co.*, 361 U.S. at 383-385. In direct conflict with these settled principles, however, the Kansas Supreme Court improperly applied a presumption that the Kansas tax scheme is constitutional and resolved "all doubts . . . in favor of its validity." App. A at 9a.

B. The Kansas Tax Scheme Is Substantially Similar to the Michigan Scheme Invalidated in *Davis*.

Like Michigan's offensive tax scheme, KITA "defines taxable income in a manner that excludes all retirement

---

(Continued from previous page)

By comparison, employees of Kansas and its political subdivisions may generally retire with full benefits after at least 10 years of service upon reaching a specified age or at any age with the completion of 40 years service. *See, e.g.*, Kan.Stat.Ann. § 74-4914(1) (Supp. 1990). For example, police officers and firefighters may retire with full benefits at age 55 following 20 years of service or at age 50 following 25 years of service. Kan.Stat.Ann. §§ 74-4957(1) and (3), 74-4955a(1) and 74-4957a(1) (Supp. 1990). For all such state and local government retirees, the amount of benefits received in retirement is based on and calculated in accordance with years of service and final average salary. *See, e.g.*, Kan.Stat.Ann. §§ 74-4915(1) and 74-4958(1) (Supp. 1990).

benefits received from the State or its political subdivisions, but includes most other forms of retirement benefits." *Davis*, 489 U.S. at 806. *See* Kan.Stat.Ann. § 79-32,116; Kan.Stat.Ann. § 79-32,117(a) and (c)(ii), (ix), (xiii) (Supp. 1990); App. A at 7a-8a and 29a.[9] By limited contrast, the Kansas scheme exempts annuities paid "from the [federal] civil service retirement and disability fund" and supplemental annuities paid to retired railway employees "under the provisions of 45 U.S.C. 228b(a) and 228c(a)(1) *et seq.*" Kan.Stat.Ann. §§ 79-32,117(c)(vii) and (viii) (Supp. 1990). *See* App. A at 8a. Nevertheless, the Kansas tax system is materially indistinguishable from Michigan's unlawful exemption scheme since all "Kansas income tax exemptions are identified strictly by source" of retirement

---

[9] Most benefits paid to retired employees of Kansas and its political subdivisions are exempt under KITA as "amounts received which are included in federal adjusted gross income but which are specifically exempt from Kansas income taxation under the laws of the state of Kansas." Kan.Stat.Ann. § 79-32,117(c)(ii) (Supp. 1990). *See* App. A at 8a: Kan.Stat.Ann. §§ 74-4923(b) (Supp. 1990) [exempting retirement benefits paid under the Kansas Public Employees Retirement System ("KPERS") and Kansas Police and Fireman's Retirement System ("KP&F")]; 74-4978g (Supp. 1990) [exempting highway patrol pension fund benefits payable under KP&F]; 72-1768a and 72-17,122 [exempting benefits paid under the school employees' supplemental retirement system]; 12-111a, 12-5005 (Supp. 1990), 13-14a10 and 14-10a10 [exempting benefits paid to retired policemen and firemen under local retirement plans]; 20-2618 (Supp. 1990) [exempting benefits paid under the retirement system for state judges]; 74-49,105 [exempting benefits paid under the official court reporters retirement system]. Pertinent text from these statutory provisions is set forth in Appendix C at 47a-58a.

pay or compensation. App. A at 26a. *See* Kan.Stat.Ann. § 32,117(c) (Supp. 1990).

The Kansas Supreme Court considered the "net result" of this source-related Kansas exemption scheme to be that "benefits paid to federal civil service, railroad, state and local government retirees are exempt from Kansas income tax while benefits paid to military retirees are not." App. A at 10a-11a. This comparison, however, obscures the true nature and extent of the differential taxation at issue. Because the Kansas Supreme Court did not follow the unequivocal mandate to examine " 'the whole tax structure of the state,' " *Phillips Chemical Co.*, 361 U.S. at 383 [citation omitted], its selective approach ignores the harsh reality that Kansas taxes every federal retiree who receives retirement pay from any federal source other than the Civil Service Retirement and Disability Fund.

In addition to military retirement pay, Kansas also refuses to exempt the retirement pay received by all other federal retirees, including: Public Health Service ["PHS"] retirees paid under 42 U.S.C.A. § 212 (West 1991); National Oceanic and Atmospheric Administration ["NOAA"] retirees paid under 33 U.S.C.A. § 853o (West 1986 and Supp. 1991); Central Intelligence Agency ["CIA"] retirees paid under the Central Intelligence Agency Retirement and Disability Act of 1964 for Certain Persons, Pub. L. 88-643, 78 Stat. 1043 (Oct. 13, 1964), as amended [50 U.S.C.A § 403 note (West 1991)]; Foreign Service retirees paid from the Foreign Service Retirement and Disability Fund, 22 U.S.C.A. § 4041 *et seq.* (West 1990 and Supp. 1991); retired Justices and Judges of the United States paid under 28 U.S.C.A. § 371 (West 1968 and Supp. 1991); retired Claims Court judges paid under 28 U.S.C.A.

§ 178; and retired bankruptcy judges and magistrates paid under 28 U.S.C. § 377 (West Supp. 1991). *See* Kan. Stat. Ann. § 79-32,117(c) [no exemption for retirement benefits paid from these federal sources]; App. A at 29a. Since these federal retirees are similarly situated with all other government retirees for tax purposes, the treatment of their federal retirement pay under KITA cannot be ignored in any objective evaluation of the Kansas source-related exemption scheme.

The opinion below, however, expressly refused to consider the differential tax treatment of these other federal retirees on the basis that they do not have *"exactly the same characteristics* as the class of military retirees . . . " App. A at 29a [emphasis added]. This refusal fundamentally conflicts with the command "to determine how other taxpayers *similarly situated* are treated," *Phillips Chemical Co.*, 361 U.S. at 383 [emphasis added], and it impermissibly limits the constitutional inquiry to those government retirees who have "exactly the same characteristics."[10] By refusing to consider the disparate treatment of other "similarly situated" federal retirees, the opinion below likewise violates the analytical requirement to "focus on the nature of the classification" erected by the Kansas exemption scheme, *Phillips Chemical Co.*, 361 U.S. at 383, and it ignores convincing evidence of KITA's discriminatory purpose. Indeed, since the Kansas Supreme Court examined and considered the tax exempt

---

[10] Since no two classes of federal, state or local government retirees have "exactly the same characteristics," the Kansas Supreme Court has erected a standard of review which, if allowed to stand, poses a direct threat to continued vitality of the nondiscrimination provisions of 4 U.S.C. § 111 and the doctrine of intergovernmental tax immunity.

treatment of all federal, state and local government retirees in the favored class created by KITA, its refusal to examine and consider the tax treatment of all federal retirees in the disfavored class is inconsistent and indefensible.

Comprehensive examination of the Kansas tax structure applicable to all government retirees clearly demonstrates that KITA favors all categories of state and local government retirees over virtually all categories of federal retirees based on the source of their retirement compensation. While source-related exemptions for retired federal civil servants and railway employees may "reduce the extent of the discrimination" created by KITA, "they obviously do not eliminate it." *Cf. Phillips Chemical Co.*, 361 U.S. at 381 n. 6. Retired officers or employees of the United States are the only government retirees whose retirement pay is subject to state income taxation and these disfavored federal retirees "would not be taxed at all if [their employer] were the State or one of its political subdivisions instead of the Federal Government." *Id.* at 382. The differential exemption scheme in Kansas is, therefore, substantially similar to the Michigan tax system repudiated by this Court, and it deserves the same fate. *See Davis*, 489 U.S. at 806 and 814-817.

C. Differential Taxation of Federal Military Retirees Is Not "Directly Related to" Any Significant Differences Between the Classes of Favored and Disfavored Government Retirees.

Relying upon *Davis* and certain federal cases having nothing to do with taxation or intergovernmental tax immunity, the Kansas Supreme Court concluded that differential taxation of military retirement pay is "directly

related to" its character as "reduced current compensation for reduced current services," while state and local government retirement pay is deferred compensation. App. A at 30a. The opinion below reasoned that there is a "direct relationship" between differential taxation and the alleged nature of retirement pay because "an evenhanded application of the rationale for taxing all members of one class (military retirees) does not result in taxation of some members of the other class (state and local government retirees)." App. A at 28a. These erroneous conclusions, however, are the result of an improper analytical approach and merit review.

The direct relationship test requires that statutory classifications which result in differential taxation must be "based on" significant differences between all members of the favored class of taxpayers and the disfavored class of taxpayers. *Phillips Chemical Co.*, 361 U.S. at 384. This test is not satisfied, however, unless the significant differences offered as justification furnish the actual reason for discrimination. *Davis*, 489 U.S. at 816-817. To paraphrase *Davis*, *"[a] tax exemption truly intended to account for differences in retirement benefits would not discriminate on the basis of the source of these benefits . . . ;* rather, it would discriminate on the basis of [asserted differences in retirement benefits]." *Id.* at 817 [emphasis added]. Therefore, a state exemption scheme which erects a source-related classification cannot survive scrutiny except where an evenhanded application of the proferred rationale for discrimination demonstrates that no members of the favored class should be taxed and no members of the disfavored class should be exempt from taxation.

Notwithstanding the existence of federal cases which view military retirement pay as "reduced current compensation for reduced current services," App. A at 24a, the opinion below fatally ignores the fact that KITA's source-related exemption scheme creates a *single disfavored class* of former federal officers or employees which includes: all recipients of military retired pay; all retired members of the PHS, NOAA, Foreign Service, and Article III judiciary; certain retired claims court judges, bankruptcy judges and magistrates; and certain retired members of the CIA.[11] All members of this class of federal

---

[11] Claims Court judges, bankruptcy judges and magistrates who retire under either the Civil Service Retirement and Disability System [5 U.S.C.A § 8331 *et seq.* (West 1980 and Supp. 1991)] or the Federal Employees' Retirement System [5 U.S.C.A. § 8401 *et seq.* (West Supp. 1991) ("FERA")] are entitled to an exemption under Kan.Stat.Ann. § 79-32,117(c)(vii) (Supp. 1990) because their retirement pay is received from the "civil service retirement and disability fund." However, Claims Court judges who have retired or elect to retire under 28 U.S.C.A. § 178 (West Supp. 1991) receive retirement pay from the Claims Court Judges Retirement Fund which is fully taxable in Kansas because Kan.Stat.Ann. § 79-32,117(c) does not recognize this federal "source" of retirement pay as the basis for an exemption. Likewise, bankruptcy judges and magistrates who have retired or elect to retire under 28 U.S.C.A. § 377 (West Supp. 1991) receive retirement pay from the Judicial Officers' Retirement Fund which is fully taxable in Kansas because Kan.Stat.Ann. § 79-32,117(c) does not recognize this federal "source" of retirement pay as the basis for an exemption.

Members of the CIA who retire or elect to retire under FERA in accordance with Title III of the Central Intelligence Agency Retirement Act of 1964 [50 U.S.C.A. § 403 note (West 1991) (Title III, §§ 301 and 307)] receive tax exempt treatment under KITA because their retirement benefits are

(Continued on following page)

retirees receive disfavored tax treatment solely because KITA does not recognize the "source" of their retirement pay as the basis for an exemption. The Kansas tax system, therefore, impermissibly erects a source-related classification which uniformly burdens all members of the disfavored class regardless of the "nature" or characterization of their federal retirement pay. *Cf. Phillips Chemical Co.*, 361 U.S. at 384 [rejecting the State's proffered justification where the offensive tax statute "impose[d] its burdens on all federal lessees" in the disfavored class without regard to alleged differences in leasing activities].

Since many members of the disfavored class undoubtedly receive retirement pay which cannot be characterized as "reduced current compensation for reduced current services," an evenhanded application of this rationale cannot justify the discriminatory classification scheme under KITA. *See Davis*, 489 U.S. at 816-817 [rejecting Michigan's rationale for differential treatment since its uniform application to all members of the favored and disfavored classes would justify an exemption for some retired federal employees and taxation of some retired state employees]. If Kansas truly intended to

---

(Continued from previous page)

paid from the "civil service retirement and disability fund." Kan.Stat.Ann. § 79-32,117(c)(vii). However, members of the CIA who retire under Title II of the Central Intelligence Agency Retirement Act of 1964 receive retirement pay from the Central Intelligence Agency Retirement and Disability Fund [50 U.S.C.A. § 403 note (Title II, §§ 202 and 211)] which is fully taxable because Kan.Stat.Ann. § 79-32,117(c) does not recognize this federal "source" of retirement pay as the basis for an exemption.

account for differences in the nature or characterization of retirement pay, it would not discriminate based on the source of payment and it would not tax any federal retirees in the disfavored class who receive deferred compensation. But KITA does both.[12]

Like the discriminatory tax scheme struck down in *Davis*, "Kansas income tax exemptions are identified strictly by source" of retirement pay, App. A at 26a, and no other factor plays any role in the exemption calculus. *Compare* Kan.Stat.Ann. § 79-32,117(c) (Supp. 1990) *with Davis*, 489 U.S. at 806 n.2 [quoting Mich. Comp. Laws Ann. § 206.30(1)(f) (Supp. 1988)]. Even if one assumes the propriety of comparing all federal, state and local government retirees in the favored class with a select subset of government retirees in the disfavored class, no statutory authority or legislative history in Kansas establishes any consistent reason for discrimination against federal military retirees except the "source" of their retirement pay.

---

[12] This same reasoning applies with equal force to the noncontributory nature of the military retirement system. The Kansas Supreme Court concedes that other federal retirees participate in contributory plans but their retirement pay is taxed under KITA. App. A at 29a. If the Kansas exemption scheme truly intended to account for differences in contributory versus noncontributory retirement systems, it would not discriminate according to source of pay and it would not tax any federal retirees in the disfavored class who have made out-of-pocket contributions to their federal retirement plan. Likewise, Kansas would provide no tax exemption for employees of the state board of regents and educational institutions under its management who fund their retirement plans with nontaxable salary reductions, instead of taxable contributions, but it does. *See* Kan.Stat.Ann. §§ 74-4923(b) and 74-4925(1)(a) and (4) (Supp. 1990).

To the contrary, Kan.Stat.Ann. § 79-32,117(a) (Supp. 1990) utilizes federal adjusted gross income ["AGI"] as "the starting point" to determine "an individual's Kansas income tax liability." App A. at 7a. Irrespective of whether federal, state or local government retirement pay is viewed as current compensation for current services or deferred compensation, the Internal Revenue Code includes them all in federal AGI without regard to "source" of payment. *See* 26 U.S.C. § 61(a) (1988); App A at 7a-8a. Likewise, regardless of its source or characterization, 26 U.S.C.A. § 219 prohibits all Kansas residents from making tax deductible contributions to an Individual Retirement Account ["IRA"] based on "any amount received as a pension or annuity" and "any amount received as deferred compensation." 26 U.S.C.A. §§ 219(a), (b)(1) and (f)(1) (West Supp. 1991). *See* App. A at 24a-25a.

Internal Revenue Code §§ 61(a) and 219 have been incorporated by KITA as the law of Kansas. But since these Code sections do not differentiate between government retirement income based on its source or character, as in *Davis*, the Kansas Legislature's intended basis for differential tax treatment is expressly revealed by a classification scheme which discriminates against all retired officers or employees of the United States who receive benefits – regardless of their actual or perceived character – from a federal source which KITA does not recognize as the basis for an exemption. *See* Kan.Stat.Ann. § 79-32,117(c) (Supp. 1990).

In other relevant and related contexts, the Kansas Legislature also plainly recognizes and treats military

retirement pay as pension income or deferred compensation rather than current compensation. For example, federal military retirees are not authorized to purchase participating service credit under the Kansas Public Employees Retirement System for any period of "active service" in the Armed Forces which is "the basis for *military pension rights*." Kan.Stat.Ann. § 74-4919h(1) (Supp. 1990) [emphasis added]. *See also* Kan.Admin.Regs. § 80-3-16 (1989) [characterizing military retirement pay as "a military longevity pension" in KPERS implementing regulations]. This prohibition was enacted by the Kansas Legislature in 1974 to "preclude the doubling up of benefits under KPERS and the military pension system," REPORT OF SPECIAL COMMITTEES TO THE 1974 LEGISLATURE, RE: PROPOSAL NO. 22 - RETIREMENT MATTERS, at 22-13 (1974), and it vividly highlights the legislative belief that "military pension rights" are actually based on past military service instead of current service.

Like other forms of pension income or deferred compensation, military retirement pay is also divisible as "marital property" in actions for divorce, separate maintenance or annulment because the Kansas Legislature has expressly determined that "[a]ll property owned by married persons" specifically includes "the present value of any vested or unvested military retirement pay." Kan.Stat.Ann. § 23-201(b) (1988). This treatment of military retirement pay is significant for two compelling and undisputed reasons. First, the *"intent and purpose of the legislature* in adopting subsection (b)" of Kan.Stat.Ann. § 23-201 *"was clearly limited to affecting taxation"* by making the transfer of marital property "a nontaxable event" between co-owners. *Wachholz v. Wachholz*, 4 Kan.App.2d

161, 163-64, 603 P.2d 647 (1979) [legislative history citations omitted and emphasis added].[13]

Second, the legislative characterization and treatment of military retirement pay as "property" which "shall become marital property" in proceedings to dissolve marriage rests upon a premise – that military retirement pay is deferred compensation for services performed during *past* years of marriage – which repudiates any alleged basis for its consideration as "current compensation." *Cf. McCarty v. McCarty*, 453 U.S. 210, 221 (1981) ["The community property division of military retired pay rests on the premise that that pay, like a typical pension, represents deferred compensation for services performed during the marriage."]. At the philosophical core, these characterizations of military retirement pay are diametrically opposed and mutually exclusive.

The opinion below acknowledges that the Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, 96 Stat. 730 (1982) ["USFSPA"], authorizes the States to treat the disposable portion of military retirement pay as "marital property" and that the Kansas Legislature amended Kan.Stat.Ann. § 23-201(b) in 1987 to do so. App. A at 19a-20a. Since the amendment simply inserted the phrase "including the present value of any vested or unvested military retirement pay," 1987 Kan. Sess.

---

[13] The opinion of the Kansas Court of Appeals in *Wachholz* has been expressly approved by the Kansas Supreme Court. *See Redmond v. Redmond*, 229 Kan. 565, 629 P.2d 142 (1981). *Cf. Cady v. Cady*, 224 Kan. 339, 581 P.2d 358 (1978) [filing a petition for divorce or separate maintenance creates a species of co-ownership in property acquired before and during marriage which avoids a taxable transfer of such property upon divorce or separation].

Laws, ch. 120, § 1, this permissible action simply reiterated the settled belief that such pay is a "military pension" or "military longevity pension" based on past years of creditable service. *See* Kan.Stat.Ann. § 74-4919h (Supp. 1990); Kan.Admin.Regs. § 80-3-16 (1989). The nature and effect of this legislative policy decision clearly rejected any supposed basis for characterizing military retirement pay as "current compensation" rather than as pension income or deferred compensation.

Nevertheless, in principal reliance upon *Cornetta v. United States*, 851 F.2d 1372, 1382 n.3 (Fed.Cir. 1987), and *United States v. Tafoya*, 803 F.2d 140, 142 n.7 (5th Cir. 1986), the Kansas Supreme Court concluded that "the USFSPA did not change the legal characterization of military retirement pay for any other purpose than cases involving marital property settlements." App. A at 21a and 21a-23a. This unsupported suggestion that existing federal case law involving nontax matters somehow prohibits the Kansas Legislature from characterizing or treating military retirement pay *for tax purposes* in the same manner as other federal, state or local government retirement benefits, however, directly conflicts with express congressional consent to "nondiscriminatory" state taxation of all pay or compensation received by active and retired employees of the United States. *See* 4 U.S.C. § 111 (1988). It also offers no meaningful insight into whether the Kansas Legislature "truly intended" to discriminate against federal military retirees on any basis other than the "source" of pay or compensation.

In the final analysis, the only expressions of actual legislative intent in Kansas demonstrate that the truly intended basis for discrimination against federal military retirees and all other federal retirees in the disfavored

class is the federal "source" of their retirement pay. The narrow and selective approach of the opinion below, however, disregards the fundamental nature and importance of the direct relationship test as a safeguard to protect the Federal Government's interests, and it reaches the wrong result based upon supposed differences that "have no direct relationship to a discriminatory tax scheme." *Kuhn*, ___ Colo. at ___, 1991 WL at 179971 at *6-7. Because the Kansas tax system does not actually rely upon supposed differences in the characterization or funding of retirement pay received by members of the disfavored class, this case merits review on certiorari to enforce the unequivocal mandate of 4 U.S.C. § 111 as reiterated and applied by this Court in *Davis*.

D. Differential Taxation of Federal Military Retirees Is Not "Justified By" Any Significant Differences Between the Classes of Favored and Disfavored Government Retirees.

The Kansas Supreme Court held that "[a] state is justified in taxing reduced current compensation paid for reduced current services while not taxing deferred compensation." App. A at 30a. Without explanation, the opinion below simply accepts the "rationale of the federal cases" to support this conclusion, even though none of these decisions involve taxation, intergovernmental tax immunity or discrimination against military retirees. Moreover, the court makes no effort to demonstrate that the supposed characterization of military retirement pay as compensation for current service has been endorsed by Congress for tax purposes; that it is a proper domestic concern of the State; or that it is directly related to a *legitimate* state interest.

Under codified principles of intergovernmental tax immunity, Congress does not recognize any distinctions between federal officers or employees who are entitled to protection from discriminatory state taxation. *See* 4 U.S.C. § 111. In view of the equal treatment objectives of the Public Salary Tax Act of 1939, it is significant that all forms of federal, state and local government retirement benefits, including military retirement pay, are subjected to the same burdens of income taxation under Internal Revenue Code §§ 61(a) and 219 regardless of their actual, intended or perceived character as one form of compensation or another.[14] Given these circumstances, the Kansas Supreme Court's stated reliance upon supposed differences in the nature of compensation to justify tax discrimination conflicts with the intent of Congress that military retirees receive the same tax treatment as all other federal, state and local government retirees. To paraphrase *Davis*: "It is difficult to imagine that Congress consented to discriminatory taxation of the pensions of retired [members of the Armed Forces] while refusing to permit such taxation of [its retired civil service] employees, and nothing in the statutory language or even in the legislative history [behind 4 U.S.C. § 111] suggests this result." *Davis*, 489 U.S. at 810.

---

[14] Similarly, the Federal Insurance Contributions Act ["FICA"] does not tax any federal, state or local government retirement benefits, including military retirement pay, as "wages" or "remuneration for employment" despite actual or perceived differences in their character. *See* 26 U.S.C.A. §§ 3121(a)(5), (i)(2), (m), and (v)(3) (West Supp. 1991). In the same vein, the Social Security Act does not consider retirement income as "wages" or "wages for services" which can reduce social security benefit payments because of excess earnings "on account of work." 42 U.S.C.A. §§ 403(b) and (f)(5)(A) and (f)(5)(C)(i) (West 1983 and Supp. 1991).

The Kansas Supreme Court's discussion of intergovernmental tax immunity is also notably silent with respect to any legitimate state interest or proper domestic concern which is promoted by its alleged justification for discrimination. Nevertheless, the discriminatory exemption scheme exists as part and parcel of the State's retirement system, the primary purpose of which is to allow employees to retire "from *active service* without prejudice" or hardship, to provide for "old age, death and termination of employment," and to effect "economy and efficiency in the administration of government affairs." Kan.Stat.Ann. § 74-4901 (1985) [emphasis added]. *Cf.* App. A at 34a-35a [discussing these purposes in conjunction with a state constitutional issue]. By offering tax-exempt retirement benefits, Kansas plainly seeks to advance its interest "in hiring and retaining qualified employees," App. A at 35a, and in protecting its employees from economic hardship upon retirement, while minimizing its employment costs.

Recognizing the impermissible and offensive nature of promoting rational state interests through discrimination against the United States and its officers or employees, this Court cogently observed in *Davis*:

> In order to provide the same after-tax benefits to all retired state employees by means of increased salaries or benefit payments instead of a tax exemption, the State would have to increase its outlays by more than the cost of the current tax exemption, since the increased payments to retirees would result in higher federal income tax payments in some circumstances. *This fact serves to illustrate the impact on the Federal Government of the State's discriminatory tax exemption for state retirees. Taxes enacted to reduce*

> *the State's employment costs at the expense of the federal treasury are the type of discriminatory legislation that the doctrine of intergovernmental tax immunity is intended to bar.*

489 U.S. at 815 n.4. [emphasis added]. Like the Michigan statute struck down in *Davis*, the Kansas source-related exemption scheme violates intergovernmental tax immunity and 4 U.S.C. § 111 by unjustifiably reducing the State's employment costs at the expense of the United States and its retirees in the disfavored class.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari to the Supreme Court of the State of Kansas should be granted.

Respectfully submitted,

JOHN C. FRIEDEN
KEVIN M. FOWLER*
FRIEDEN, HAYNES & FORBES
400 S.W. 8th, Suite 409
Topeka, KS 66603
(913) 232-7266

*Counsel of Record

TERENCE A. LOBER
DAVIS, BEALL, MCGUIRE & THOMPSON, Chartered
117 Cherokee Street
Leavenworth, KS 66048
(913) 682-3822

KENTON C. GRANGER
ANGELA K. GREEN
NIEWALD, WALDECK & BROWN, P.C.
9401 Indian Creek Parkway
Corporate Woods,
Building 40, Suite 550
Overland Park, KS 66225
(913) 451-1717

ROGER M. THEIS
9411 Shannon Way Court
Wichita, KS 67206
(316) 634-0418

Counsel For Petitioners

APPENDIX A

No. 65,848

KEYTON BARKER and PAULINE BARKER, *et al.*, *Appellants*, v. STATE OF KANSAS, *et al.*, *Appellees*.

SYLLABUS BY THE COURT

1. STATUTES – *Constitutionality – Court's Duty to Uphold Constitutionality if Possible.* The constitutionality of a statute is presumed and all doubts should be resolved in favor of its validity. Before the statute may be struck down, it must clearly appear the statute violates the Constitution. It is this court's duty to uphold the statute under attack, if possible, rather than defeat it. If there is any reasonable way to construe the statute as constitutional, the court should do so.

2. SAME – *Kansas Income Tax Act – Constitutionality of Tax Imposed on Military Retirement Pay.* The Kansas Income Tax Act, K.S.A. 79-3201 *et seq.*, is constitutional. The differential tax treatment created by a state income tax imposed on federal military retirement benefits while exempting benefits received by other retirees is directly related to and justified by significant differences between the two classes of retirees and, consequently, meets the requirements of *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 103 L. Ed. 2d 891, 109 S. Ct. 1500 (1989).

3. SAME – *Kansas Income Tax Act – Constitutionality of Tax Imposed on Military Retirement Pay.* The Kansas Income Tax Act, K.S.A. 79-3201 *et seq.*, does not discriminate against federal military retirees in a manner that violates 4 U.S.C. § 111 (1988) and the constitutional principles of intergovernmental tax immunity and Article 11, § 2 of the Kansas Constitution.

4. KANSAS CONSTITUTION – *Income Tax Restrictions.* Article 11, § 2 of the Kansas Constitution prohibits the State from levying or collecting income taxes based upon classifications which are arbitrary, capricious, and discriminatory. A discriminatory tax must have a reasonable relationship to the subject of the right and privilege taxed. Nothing forbids different taxation of different classes where there is a reasonable basis for differentiation.

5. TAXATION – *Income Tax – Constitutionality of Tax Imposed on Military Retirement Benefits – State Has Rational Reason for Discriminating between State and Federal Retirees.* The Kansas Income Tax Act, K.S.A. 79-3201 *et seq.*, bears a reasonable relationship to the subject taxed and is not arbitrary and capricious and, thus, does not violate Article 11, § 2 of the Kansas Constitution. The State has a "rational reason" for discriminating between state and federal retirees when it seeks to advance its interest in hiring and retaining qualified state and local government employees by offering tax-free retirement benefits.

Appeal from Shawnee district court; ADRIAN J. ALLEN, judge. Opinion filed July 12, 1991. Affirmed.

Kevin M. Fowler, of Frieden, Haynes & Forbes, of Topeka, argued the cause, and *John C. Frieden* and *Wendell Betts*, of the same firm; *Kenton C. Granger*, *Raymond L. Dahlberg*, *Angela K. Green*, and *Kristin L. Altice*, of Niewald, Waldeck & Brown, of Overland Park; *Terence A. Lober*, of Davis, Beall, McGuire & Thompson, Chartered, of Leavenworth; and *Mark G. Ayesh*, *Michael D. Herd*, and *Roger M. Theis*, of Ayesh, Docking, Herd & Theis, of Wichita, were with him on the briefs for appellants.

James Bartle, attorney, Kansas Department of Revenue, argued the cause, and *Mark A. Burghart*, general counsel, and *Michael M. Rehm*, attorney, were with him on the briefs for appellees.

The opinion of the court was delivered by

Six, J.: This is a constitutional law case. Plaintiffs/taxpayers (retired military), in consolidated class actions, challenge the taxing of federal military retirement benefits under the Kansas Income Tax Act (KITA), K.S.A. 79-3201 *et seq.* State and local government retirement benefits are not taxed under KITA.

The plaintiffs/taxpayers appeal from the trial court's memorandum decision and order, which denied their motion for summary judgment and entered summary judgment in favor of the defendants (the State, the Department of Revenue, and two state officials). The trial court upheld the differential tax treatment of federal military retirement benefits under KITA.

Is K.S.A. 79-3201 *et seq.* constitutional? The primary issue is whether the inconsistent tax treatment is directly related to and justified by significant differences between federal military retirees taxed by Kansas and other retirees not taxed by Kansas.

Our jurisdiction is under K.S.A. 20-3017. We granted the taxpayers' motion to transfer from the Court of Appeals.

We find no error and affirm. K.S.A. 79-3201 *et seq.* is constitutional.

Facts

On March 28, 1989, the United States Supreme Court held that a Michigan statute imposing a state income tax on retirement benefits of federal civil service retirees,

while exempting retirement benefits of State retirees, violated the doctrine of inter-governmental tax immunity. *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 103 L. Ed. 2d 891, 109 S. Ct. 1500 (1989).

On April 17, 1989, the instant class action suits were filed challenging the validity of the provisions of KITA. The challenged provisions tax federal military retirement benefits while exempting retirement benefits received by state and local government retirees.

All named plaintiffs in the instant action are Kansas residents who are retired members of the United States Armed Forces and, where applicable, their joint taxpayer spouses. They have paid Kansas income taxes on federal military retirement pay during one or more years from 1984 through 1989. The certified class is defined as:

"[A]ll retired members of the federal or United States armed forces who are recipients of federal armed forces retirement benefits [under applicable provisions of Title 10 or Title 14 or the United States Code] subject to Kansas state income taxation during one or more of the tax years from 1984 through 1989 and, where applicable, their respective spouses who have filed or will file joint Kansas state income tax returns during one or more of the tax years from 1984 through 1989."

There are approximately 14,000 military retirees who are members of the class.

Defendants are the State of Kansas, the Kansas Department of Revenue, Secretary of Revenue Ed Rolfs, and Acting Director of Taxation Steve Stotts. Defendants Rolfs and Stotts are named in their official capacity as administrators charged with enforcement of KITA.

The Taxpayers' Claims

The taxpayers claim KITA discriminates against federal military retirees and, therefore, violates: (1) 4 U.S.C. § 111 (1988), and constitutional principles of intergovernmental tax immunity as discussed and applied in *Davis;* (2) the supremacy clause of the United States Constitution; (3) the privileges and immunities clause of the Fourteenth Amendment of the United States Constitution; and (4) Article 11, § 2 of the Kansas Constitution. The taxpayers also allege deprivation of their civil rights as secured by the United States Constitution and laws in violation of the Fourteenth Amendment and of 42 U.S.C. § 1983 (1988).

The taxpayers sought declaratory judgment that KITA is unconstitutional as applied to federal military retirees and that military retirement pay is exempt from Kansas income taxation for tax years 1984 to the present. The taxpayers also seek a permanent injunction prohibiting defendants from levying, assessing, and/or collecting Kansas income taxes on military retirement benefits. Refunds of Kansas income tax paid by members of the plaintiff class on their military retirement benefits from tax years 1984 to the present (with interest at the rate of 12% per year until paid) and costs including reasonable attorney fees under 42 U.S.C. § 1988 (1988), are also requested.

The taxpayers filed a motion for summary judgment. They argued that under *Davis* KITA is unconstitutional because it discriminates in favor of state and local government retirees and against federal military retirees based on the source of retirement benefits. Taxpayers

further argued that the inconsistent tax treatment is neither directly related to nor justified by significant differences between the classes of retirees.

Defendants' Claims

The defendants responded to the taxpayers' contentions by arguing that the inconsistent tax treatment of the two classes of retirees is directly related to, and justified by, significant differences between the two classes; that *Davis* has been complied with; and that the Kansas income tax law is supported by a rational basis and does not violate the Kansas Constitution. Defendants also argued that the taxpayers are not entitled to relief under 42 U.S.C. § 1983 because: (1) the State of Kansas and the Kansas Department of Revenue are not "persons" under § 1983; (2) the Secretary of Revenue and the Director of Taxation, acting in their official capacities, are not "persons" under § 1983; (3) exhaustion of administrative remedies is required before a state tax may be challenged under § 1983; and (4) 4 U.S.C. § 111 does not create enforceable individual rights. Finally, defendants asserted that if the court finds KITA invalid, the taxpayers are not entitled to retrospective relief under either federal law or K.S.A. 79-32,105(c).

The Trial Court's Decision

The trial court entered its memorandum decision denying the taxpayers' motion for summary judgment and entered summary judgment *sua sponte* for defendants. The trial court held that KITA, as applied to military retirement pay, is constitutional and does not violate

4 U.S.C. § 111. Finding that there are substantial differences between the two classes (military retirees and state and local government retirees) justifying the disparate tax treatment, the trial court stated:

"Viewed in toto the military retired system is unique to other retirement systems, especially in light of the fact that military retirees are subject to recall and during active service do not contribute to their retired pay. The absence of contribution during active service by military retirees or by their employer, the Federal Government, is consistent with the [*United States v.*] *Tyler,* [105 U.S. (15 Otto) 244, 26 L. Ed. 985 (1881),] and *McCarty* [*v. McCarty,* 453 U.S. 210, 69 L. Ed. 2d 589, 101 S. Ct. 2728 (1981),] decisions which state military retired pay is reduced compensation for reduced current services."

The trial court considered all other issues raised by the parties and found them to be without merit. Finding KITA valid, the trial court did not address the request for refunds. The trial court stated that defendant's motion for partial summary judgment on the civil rights claim under 42 U.S.C. § 1983 was moot.

The Relevant KITA Tax Scheme

Under KITA, federal adjusted gross income (AGI) is the starting point for determining an individual's Kansas income tax liability. An individual's Kansas AGI is an individual's federal AGI, subject to certain modifications. K.S.A. 1990 Supp. 79-32,117(a). An individual's Kansas taxable income is Kansas AGI less Kansas deductions and exemptions. K.S.A. 79-32,116.

Federal AGI includes military retirement benefits and state and local government retirement benefits, 26 U.S.C.

§ 61(a) (1988). Retirement benefits received from the Kansas Public Employees Retirement System (KPERS) are subtracted from federal AGI to arrive at Kansas AGI and are exempt from Kansas income tax. K.S.A. 1990 Supp. 72-32,117(c)(ii). See K.S.A. 1990 Supp. 74-4923(b) (also exempts benefits paid under the Kansas Police and Fireman's Retirement System [KP&F]). There are similar statutory exemptions for benefits received by other retired state and local employees. K.S.A. 1990 Supp. 74-4978g (benefits from the highway patrol pension fund payable under KP&F); K.S.A. 72-1768a and K.S.A. 72-17,122 (benefits paid under the school employees' supplemental retirement system); K.S.A. 1990 Supp. 20-2618 (benefits paid under retirement systems for judges); K.S.A. 12-111a, K.S.A. 1990 Supp. 12-5005, K.S.A. 13-14a10, and K.S.A. 14-10a10 (benefits paid to policemen and firemen under local retirement plans); K.S.A. 1990 Supp. 79-32,117(c)(ix) (benefits paid to retired city employees); and K.S.A. 1990 Supp. 79-32,117(c)(xiii) (benefits paid to retired employees of a board of public utilities).

Certain federal retirement benefits are also subtracted from federal AGI to arrive at Kansas AGI and are exempt from Kansas income tax. Benefits received as annuities under the federal civil service retirement system or benefits received by retired railroad employees are exempted from Kansas income tax. K.S.A. 1990 Supp. 79-32,117(c)(vii) and (viii).

Military retirement benefits are not subtracted from federal AGI and are included in Kansas AGI under KITA. Military retirement benefits are subject to Kansas income tax. Military retirees age 62 or older are entitled to a $120 tax credit against Kansas income tax. K.S.A. 79-32,111b.

The net result is that benefits paid to federal civil service, railroad, state, and local government retirees are exempt from Kansas income tax while benefits paid to military retirees are not.

Presumption of Constitutionality

In determining the constitutionality of K.S.A. 79-3201 *et seq.*, we note the following principles: Construction of a statute is a question of law, and it is the function of this court to construe a statute to give it the effect intended by the legislature. *NCAA v. Kansas Dept. of Revenue*, 245 Kan. 553, 557, 781 P.2d 726 (1989).

The constitutionality of a statute is presumed and all doubts should be resolved in favor of its validity. Before the statute may be struck down, it must clearly appear the statute violates the Constitution. It is this court's duty to uphold the statute under attack, if possible, rather than defeat it. If there is any reasonable way to construe the statute as constitutional, we should do so. *Guardian Title Co. v. Bell*, 248 Kan. 146, 149, 805 P.2d 33 (1991). However, when legislation encroaches upon constitutional provisions, it is our duty and obligation to declare the legislation unconstitutional. *Berentz v. Comm'rs of Coffeyville*, 159 Kan. 58, 62-63, 152 P.2d 53 (1944).

Intergovernmental Tax Immunity and the *Davis* Decision

The taxpayers filed the instant action in response to the United States Supreme Court's decision in *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 103 L. Ed. 2d 891,

109 S. Ct. 1500 (1989). In *Davis*, a retired federal government employee receiving federal civil service retirement benefits challenged the Michigan Income Tax Act (MITA). MITA is similar to KITA. MITA commences with federal adjusted gross income to define Michigan taxable income and allows a deduction for all benefits received from public retirement systems created by the State of Michigan or its political subdivisions. MITA limits the deduction for most other retirement benefits, including federal civil service retirement benefits, to $7,500 for a single return and $10,000 for a joint return. *Davis*, 489 U.S. at 806 n.2.

Davis challenged the taxation of his federal civil service retirement benefits under the doctrine of intergovernmental tax immunity and 4 U.S.C. § 111. 4 U.S.C. § 111 provides in relevant part:

"The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States . . . by a duly constituted tax authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation."

The doctrine of intergovernmental tax immunity carries a traceable lineage to *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 4 L. Ed. 579 (1819). *McCulloch* held that a state may not impose a discriminatory tax on the Bank of the United States. The United States Supreme Court, speaking through Chief Justice John Marshall, reasoned that the Bank was an instrumentality of the federal government and taxation by the state would interfere with the exercise of federal powers delegated to the Bank.

This doctrine was more fully developed in *Helvering v. Gerhardt*, 304 U.S. 405, 82 L. Ed. 1427, 58 S. Ct. 969 (1938) (the federal government could levy nondiscriminatory taxes on the income of most state employees), and *Graves v. N.Y. ex rel. O'Keefe*, 306 U.S. 466, 83 L. Ed. 927, 59 S. Ct. 595 (1939) (federal employees were subject to nondiscriminatory taxes levied by the states). "After *Graves*, therefore, intergovernmental tax immunity barred only those taxes that were imposed directly on one sovereign by the other or that discriminated against a sovereign or those with whom it dealt." *Davis*, 489 U.S. at 811.

In effect, 4 U.S.C. § 111 codified the result in *Graves*. The final clause of § 111, "if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation," makes it clear that immunity from taxation was waived for only nondiscriminatory taxes. Because § 111 embodied the modern constitutional doctrine of intergovernmental tax immunity, the United States Supreme Court in *Davis* concluded that the dispositive question was whether MITA violated the doctrine of intergovernmental tax immunity. *Davis*, 489 U.S. at 813-14.

Relying on *Phillips Co. v. Dumas School Dist.*, 361 U.S. 376, 383-85, 4 L. Ed. 2d 384, 80 S. Ct. 474 (1960), the *Davis* court stated: "[T]he relevant inquiry is whether the inconsistent tax treatment is directly related to, and justified by, 'significant differences between the two classes.' " 489 U.S. at 816.

Michigan unsuccessfully asserted two allegedly significant differences between federal and state retirees.

First, Michigan argued that its interest in hiring and retaining qualified civil servants through the inducement of a tax exemption for retirement benefits justified the preferential treatment of its retired employees. The United States Supreme Court rejected this argument, stating the argument does nothing to demonstrate differences between the classes, but merely demonstrates that Michigan has a rational basis for discriminating between the two similar classes. Michigan's interest, no matter how substantial, was irrelevant. 489 U.S. at 816. An equal protection analysis is irrelevant in the context of intergovernmental immunity. See *Phillips Co.*, 361 U.S. at 383-85.

Second, Michigan argued that its retirement benefits are significantly less munificent than federal retirement benefits in terms of vesting requirements, rate of accrual, and computation of benefit amounts. The substantial differences in the value of the retirement benefits, in Michigan's view, justified the inconsistent tax treatment, 489 U.S. at 816. The *Davis* Court rejected this argument by pointing out that, while the average federal civil servant receives a larger pension than his state counterpart, there are undoubtedly instances in which the opposite is true. The Court stated: "A tax exemption truly intended to account for differences in retirement benefits would not discriminate on the basis of the source of those benefits, as Michigan's statute does; rather, it would discriminate on the basis of the amount of benefits received by individual retirees." 489 U.S. at 817.

The *Davis* Court concluded that MITA violated principles of intergovernmental tax immunity by favoring retired state and local government employees over retired

federal government employees. Michigan conceded that a refund was appropriate; therefore, *Davis* did not address the issue of retrospective relief. *Davis* was remanded on the issue of prospective relief. The *Davis* Court stated that discriminatory taxation could be avoided by either extending the exemption to federal retirees or removing the exemption for state and local retirees, but recognized that the Michigan courts are in the better position to determine how to comply with the mandate of equal treatment. 489 U.S. at 817-18.

Davis relied on *Phillips*, 361 U.S. 376. In *Phillips*, the State of Texas imposed a tax measured by the full value of real property owned by the United States upon the lessee of that property (Phillips Chemical Co.). Real property owned by the United States was exempt from tax. Lessees of exempt property owned by the state and its political subdivisions, with similar lease provisions, were not taxed on their leaseholds.

A unanimous Supreme Court reversed the Texas Supreme Court, holding that the tax imposed on federal government lessees unconstitutionally discriminated against the United States and those with whom it dealt. 361 U.S. at 387. Because the discrimination was apparent, the Court stated: "The imposition of a heavier tax burden on lessees of federal property than is imposed on lessees of other exempt public property must be justified by significant differences between the two classes." 361 U.S. at 383.

Texas argued three differences justified the disparate tax treatment: (1) The State can collect in rent what it loses in taxes from its own lessees, which it cannot do

with federal government lessees; (2) the State may foster its own interests by adopting measures which facilitate the leasing of its property; and (3) the greater magnitude of the federal leasing of exempt land has a greater impact on the finances and operations on local government than does the State's leasing activities. 361 U.S. at 383-84.

The Court in *Phillips* found none of these considerations justified the disparate tax treatment. In regard to the first proffered justification, the Court reasoned that what the Texas political subdivisions lose in taxes from the State's lessees is not made up in increased rent. Other local taxpayers, including the federal government's lessees, must make up the difference. The State's second proffered justification was a legitimate state objective; however, the discriminatory taxation of the federal government's lessees was impermissible regardless of the State's legitimate objective. As to the alleged greater impact of federal leasing, the Court stated that the taxing statute was not based on this difference. The taxing statute imposed its burdens on *all* lessees of government property with no relation to the impact on local government. 361 U.S. at 384-85.

Unfortunately, neither *Davis* nor *Phillips* provide further guidance on how to determine whether the inconsistent tax treatment is "directly related to, and justified by, 'significant differences between the two classes.' "

One post-*Davis* commentator has observed that the courts are now left without easy guidelines to determine whether a state tax is discriminatory. Note, Rejection of the "Similarly Situated Taxpayer" Rationale: *Davis v.*

Michigan Department of Treasury, 43 Tax Law. 431, 439-40 (1990).

KITA exempts federal civil service retirement benefits from taxation. In this respect, *Davis* is not directly on point. The crucial issue in the case at bar is whether the inconsistent taxation of federal military retirement benefits is "directly related to, and justified by, 'significant differences' " between federal military retirees and state and local government retirees.

The Taxpayers' Contentions

The taxpayers contend that the inconsistent tax treatment of military retirees is not directly related to, and justified by, significant differences between the two classes. They advance various arguments, sometimes overlapping, to support their "no significant difference" contention.

The taxpayers argue that federal military retirees and state and local government retirees are similarly situated and should be treated the same under KITA. In other words, there are no *significant* differences between the two classes. In support of this argument, they assert the trial court emphasized *immaterial* differences. The taxpayers point to the following similar characteristics: (1) both federal military retirees and state and local government retirees are entitled to retire and receive retirement benefits upon satisfying statutory requirements for eligibility; (2) upon retirement both classes of retirees leave active government service; (3) retirees of each class receive retirement benefits based on their number of years of service and their highest salary received before

retirement; and (4) Kansas treats both federal military retirement benefits and state and local government retirement benefits as deferred compensation.

The Defendants' Contentions

Defendants counter, contending that federal military retirees and state and local government retirees are not similarly situated. Defendants mark the following differences: (1) federal military retirees remain members of the armed forces of the United States after they retire from active duty; they are retired from active duty only; (2) federal military retirees are subject to the Uniform Code of Military Justice (UCMJ) and may be court martialed for offenses committed after retirement; (3) they are subject to restrictions on civilian employment after retirement; (4) federal military retirees are subject to involuntary recall; (5) federal military retirement benefits are not deferred compensation but current pay for continued readiness to return to duty; and (6) the federal military retirement system is noncontributory and funded by annual appropriations from Congress; thus, all benefits received by military retirees have never been subject to tax.

In contrast, defendants assert: State and local government retirees are completely severed from employment and have no continuing connection with government employers. State and local retirees are not subject to government personnel procedures or disciplinary rules, and there are no restrictions on their post-retirement activities. State and local government retirees are not subject to involuntary recall. State and local government

retirement benefits are deferred compensation, not current pay. KPERS benefits are funded by regular employee and employer contributions. Participation in KPERS is mandatory, and state employees are required to make contributions to KPERS after working for the State for one year. Employee contributions to KPERS are subject to Kansas income tax in the year in which they are made; thus, KPERS benefits received by State employees include these previously taxed contributions.

The first four differences between military and state and local government retirees asserted by defendants support the contention that federal military retirement benefits are reduced compensation for reduced current services. The reduced compensation for reduced current services difference was the basis for the trial court's decision in the case at bar. Relying on *McCarty v. McCarty*, 453 U.S. 210, 69 L. Ed. 2d 589, 101 S. Ct. 2728 (1981), *United States v. Tyler*, 105 U.S. (15 Otto) 244, 26 L. Ed. 985 (1881), and *Cornetta v. United States*, 851 F.2d 1372 (Fed. Cir. 1988), the trial court found "that due to the United States Supreme Court's characterization of military retired pay as reduced compensation for reduced current services the KITA must be found constitutional."

The Federal Cases

The United States Supreme Court held in *Tyler* that a retired military officer was entitled to the benefit of a statute that increased the pay of commissioned officers for every five years of service. The statute applied to the years in the service after retirement as well as before. The Court stated with reference to military retirement pay:

"[C]ompensation is continued at a reduced rate, and the connection is continued, with a retirement from active service only." 105 U.S. at 245. The *Tyler* Court concluded:

"It is impossible to hold that men who are by statute declared to be part of the army, who may wear its uniform, whose names shall be borne upon its register, who may be assigned by their superior officers to specified duties by detail as other officers are, who are subject to the rules and articles of war, and may be tried, not by a jury, as other citizens are, but by a military court-martial, for any breach of those rules, and who may finally be dismissed on such trial from the service in disgrace, are still *not* in the military service." 105 U.S. at 246.

In *McCarty*, an Army officer challenged a California Superior Court ruling that his "military pension and retirement rights" were subject to division as quasi-community property upon dissolution of marriage. 453 U.S. at 218. The California Court of Appeals affirmed, relying on *In re Marriage of Fithian*, 10 Cal. 3d 592, 111 Cal. Rptr. 369, 517 P.2d 449, *cert. denied* 419 U.S. 825 (1974),which held that military retirement was properly subject to division as community property upon divorce. The California Supreme Court denied McCarty's petition for hearing. 453 U.S. at 218-19.

On appeal to the United States Supreme Court, McCarty argued that "military retired pay in fact is current compensation for reduced, but currently rendered, services" and may not be treated as community property since it is earned after the dissolution of the marriage. 453 U.S. at 221. The United States Supreme Court noted that military retired pay differs in some significant respects from a typical retirement plan: The retired officer remains

a member of the Army; the officer continues to be subject to the Uniform Code of Military Justice; the officer may forfeit all or part of retirement pay if certain activities are engaged in; and the retired officer remains subject to recall to active duty at any time. 453 U.S. at 221-22. The *McCarty* Court stated: "These factors have led several courts, *including this one*, to conclude that military retired pay is reduced compensation for reduced current services." (Emphasis added.) 453 U.S. at 222.

We consider the "retired pay is reduced compensation for reduced current services" characterization by the United States Supreme Court in *McCarty* to be significant in resolving the issue before us in the case at bar.

The Court in *McCarty* declined to decide whether federal law prohibits a state from characterizing retired pay as deferred compensation. The Court accepted McCarty's alternative argument that California's community property laws improperly interfered with the federal military system, which indicated that Congress intended military retirement pay to be a personal entitlement of the retiree.

In response to *McCarty*, Congress enacted the Uniformed Services Former Spouses' Protection Act (USFSPA), Pub. L. No. 97-252, 96 Stat. 730 (1982). The USFSPA includes 10 U.S.C. § 1408(c)(1) (1988), which authorizes state courts to treat disposable retired pay as marital property. *Mansell v. Mansell*, 490 U.S. 581, 584-85, 104 L. Ed. 2d 675, 109 S. Ct. 2023 (1989). "Disposable retired or retainer pay" is defined as "the total monthly retired or retainer pay to which a member is entitled," less certain deductions. 10 U.S.C. § 1408(a)(4).

Following congressional enactment of the USFSPA, the Kansas Court of Appeals held that military retirement pay was not marital property and was nothing more than a future stream of income which will cease at the death of the retiree. *Grant v. Grant*, 9 Kan. App. 2d 671, 676, 685 P.2d 327, *rev. denied* 236 Kan. 875 (1984). The Court of Appeals concluded: "[M]ilitary retirement pay has no present determinable value which would qualify it as a marital asset subject to division.' 9 Kan. App. 2d at 676. In 1987, Kansas amended K.S.A. 23-201(b) (Ensley 1981) to treat military retirement pay as marital property upon commencement of an action for divorce, separate maintenance, or annulment.

The taxpayers argue that regardless of federal case law, Kansas has opted to treat military retirement pay as marital property and, therefore, not current income. The taxpayers assert that Kansas may not rely on federal case law involving nontaxation issues which state that military retired pay is reduced compensation for reduced current services.

Defendants counter the taxpayers' argument by reasoning that the USFSPA authorizes states to treat military retirement pay as marital property only between spouses in divorce cases. Furthermore, under K.S.A. 23-201(b), military retirement pay is not considered marital property until the commencement of an action for divorce, separate maintenance, or annulment. Defendants reason taxpayers have not alleged the commencement of such an action; consequently, Kansas does not consider their military retirement pay as marital property.

The trial court rejected the taxpayers' K.S.A. 23-201(b) argument, relying on *Cornetta v. United States*, 851 F.2d 1372. The trial court reasoned that the USFSPA did not change the legal characterization of military retirement pay for any other purpose than cases involving marital property settlements. We agree.

Cornetta involved a retired Marine officer who brought a wrongful discharge claim against the government approximately seven years after his discharge. The federal district court dismissed the action on the grounds of laches, finding that the seven-year delay was unreasonable and that the government had been prejudiced by the delay. Initially, the Court of Appeals affirmed the federal district court holding. *Cornetta v. United States*, 831 F.2d 1039 (Fed. Cir. 1987). On motion for rehearing, the court reversed, finding in part that the possibility that the officer might receive increased retirement benefits was not sufficient economic prejudice to the government. The Court of Appeals reasoned:

"Retired pay is reduced pay for reduced current services. *Hotinsky v. United States*, 292 F.2d 508, 510, 154 Ct. Cl. 443 (1961) (an officer draws retired pay because he is 'still an officer' in service of country); *Lemly v. United States*, 75 F. Supp. 248, 249, 109 Ct. Cl. 760 (1948) (an officer receiving retired pay 'is still an officer in the service of his country even though on the retired list'); *see United States v. Tafoya*, 803 F.2d 140, 142 (5th Cir. 1986) (retired pay is " 'current pay" designed in part to compensate [an officer] for his continuing readiness to return to duty should his country have need to call upon him'); *Costello v. United States*, 587 F.2d 424, 427 (9th Cir. 1978) ('retirement pay does not differ from active duty pay in its character as pay for continuing military service'); *Berkey v. United States*, 361 F.2d 983, 987 n.9, 176 Ct. Cl. 1 (1966) (retired

pay 'has generally not been considered a pension, grant, or gratuity, but as something the serviceman earns and has earned'). . . .

"Unlike an award of back pay where the government in effect pays for unperformed service, receipt of retired pay by an officer means the government will pay for the reduced service it then receives. This is no detriment; the government gets what it pays for." 851 F.2d at 1382.

Cornetta noted that 10 U.S.C. § 1408(c)(1) did not affect the characterization of military retired pay as reduced compensation for reduced current services. 851 F.2d at 1382 n.3 (citing *United States v. Tafoya*, 803 F.2d 140, 142 n.7 [5th Cir. 1986]).

We consider the status analysis of military retirement pay found in *Cornetta* significant.

In *Tafoya*, the defendant appealed from a court order withholding a portion of his army retirement pay to repay the government for services rendered by a public defender. The *Tafoya* court noted: "By some quirk of history, however, Tafoya's retirement pay is actually not 'retirement pay'; it is instead 'current pay' designed in part to compensate Tafoya for his continuing readiness to return to duty should his country have need to call upon him." 803 F.2d at 142 (citing *McCarty*). Current pay may not be offset absent specific statutory authority. The court in *Tafoya* noted that *McCarty* had been superseded by statute but found that the classification of military retired pay as current pay remains viable. 803 F.2d at 142 n.7. After determining military retired pay is current pay, the court denied the right of setoff, finding no statutory authority to set off Tafoya's pay. 803 F.2d at 143. *Tafoya's* "current pay" determination of military retired pay

extends cumulative support to affirmance of the trial court in the instant case.

In *Costello v. United States*, 587 F.2d 424 (9th Cir. 1978), military retirees brought suit to challenge statutory changes to military retirement compensation. The retirees argued that military retirement pay is deferred compensation for past services, which could not be prospectively altered. The Ninth Circuit rejected this argument, finding that military retirement pay does not differ from active duty pay in its character as pay for continuing military service. The compensation could be prospectively altered without offending due process. 587 F.2d at 427-28. *Costello* provides a Ninth Circuit endorsement of the similar character of military retired pay and active duty pay.

In *In re Siverling*, 72 Bankr. 78 (Bankr. W.D. Mo. 1987), creditors objected to the debtor's claim that his military retirement pay was not property of the estate under 11 U.S.C. § 541(a)(6) (1988). 11 U.S.C. § 541(a)(1) provides that the bankruptcy estate consists of "all legal or equitable interests of the debtor in property as of the commencement of the case." However, "earnings from services performed by an individual debtor after the commencement of the case" are not property of the estate. 11 U.S.C. § 541(a)(6). The court cited *Tyler* and *McCarty*, finding military retirement pay is "reduced compensation for reduced current services" and not property of the estate. 72 Bankr. at 78-79.

These federal cases offer interpretative assistance and demonstrate the current vitality of *Tyler's* conclusion in

1881 that military retirement pay is reduced current compensation for reduced current services. In addition, *Cornetta*, *Tafoya*, and *Siverling*, all post-USFSPA cases, indicate that the USFSPA has not changed the federal characterization of military retirement pay as reduced current compensation for reduced current services.

The IRA Deduction

The taxpayers also argue that KITA considers military retirement pay as a pension, annuity, or deferred compensation; therefore, KITA may not also consider military retirement pay as current compensation. Because Kansas utilizes federal AGI to calculate Kansas taxable income, Kansas has incorporated 26 U.S.C. § 219 (1988) into KITA.

26 U.S.C. § 219 governs the deductibility of taxpayer contributions to an individual retirement account (IRA). The IRA deduction is limited to the amount of the taxpayer's "compensation" for the tax year. 26 U.S.C. § 219(b). For purposes of § 219, "the term 'compensation' does not include any amount received as a pension or annuity and does not include any amount received as deferred compensation." 26 U.S.C. § 219(f)(1). Each "active participant" in a retirement or pension plan "established for its employees by the United States, by a state or political subdivision thereof, or by an agency or instrumentality of any of the foregoing," is subject to further limitations on the IRA deductions which may render the deduction unavailable. 26 U.S.C. § 219(g)(1), (2), and (5)(A)(iii).

Under § 219(f)(1), "Retirement income, including federal, civil and military retirement income, is not compensation for purposes of making deductible contributions to an IRA." 6 Mertens Law of Federal Income Taxation § 25C.12, p. 58 (1988).

"This interpretation is consistent with the legislative intent behind the enactment of the tax law relating to IRAs. The purpose of an IRA is to give employees or self-employed individuals the opportunity to set aside some of their earnings for retirement. [Citations omitted.] To base an IRA deduction upon contributions made with retirement pay would be inconsistent with this purpose." IRS Letter Ruling 8227053 (CCH) (April 9, 1982).

Section 219 does not consider military retirement pay as current income for reduced current services. However, this limited definition of "compensation" applies to § 219 *only*. 26 U.S.C. § 219(f)(1). As noted above, to allow an IRA deduction for contributions made with retirement pay would be inconsistent with the purpose of an IRA, regardless of whether retirement pay is "deferred compensation" or "reduced compensation for reduced current services." Additionally, compensation does not include *current income* from passive sources such as rental income, interest income, and dividend income. Mertens, § 25C.12, p. 58.

Thus, the distinction is not so much the characterization as current income or deferred compensation, but rather active versus passive activities required to earn the income.

Funding Differences

Defendants also rely on the difference in funding the military retirement system and state and local retirement systems. State and local retirement benefits are funded by employee and employer contributions. See, *e.g.*, K.S.A. 1990 Supp. 74-4919(1) (KPERS employee contribution) and K.S.A. 1990 Supp. 74-4920 (KPERS employer contribution). The employee's contribution is taxed by Kansas in the year that it is made. K.S.A. 1990 Supp. 79-32,117(b)(vi); K.S.A. 1990 Supp. 74-4919(2). Part of the state and local government retirement benefits received after retirement include previously taxed contributions.

In contrast, the military retirement system is noncontributory. Neither military personnel nor the armed forces contribute to the military retirement system. The military retirement system is funded by annual appropriations from Congress. *McCarty v. McCarty*, 453 U.S. 210, 214, 69 L. Ed. 2d 589, 101 S. Ct. 2728 (1981). All military retirement benefits received by military retirees consist of money which has never been subject to tax. The federal government's method of funding prevents Kansas from taxing a portion of the military retirement benefits before such benefits are received.

The taxpayers argue that the inconsistent taxation of state and local retirement pay and federal military retirement pay is not directly related to significant differences between the two classes. Kansas income tax exemptions are identified strictly by source under K.S.A. 1990 Supp. 79-32,117(c). If the inconsistent tax treatment were directly related to significant differences, the taxpayers claim, KITA would not base its distinctions on source but

instead would base them on: (1) retirees who completely retire versus retirees who retire from active duty only; (2) retirees who are subject to involuntary recall; (3) retirees who are subject to the Uniform Code of Military Justice; (4) retirees who are subject to post-retirement restrictions; and (5) retirees who participate in a contributory retirement program. The taxpayers rely on *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 817, 103 L. Ed. 2d 891, 109 S. Ct. 1500 (1989), which stated: "A tax exemption truly intended to account for differences in retirement benefits would not discriminate on the basis of the source of those benefits, as Michigan's statute does; rather, it would discriminate on the basis of the amount of benefits received by individual retirees."

Defendants counter this "basis of the source" argument by pointing out that the statement from *Davis* quoted above followed the *Davis* Court's rejection of Michigan's proffered rationale for its inconsistent tax treatment. Michigan contended that the inconsistent tax treatment was justified because federal civil service retirement benefits were more munificent than Michigan's state retirement benefits. Specifically, Michigan asserted that the value of federal civil service benefits was larger than the value of state retirement benefits. The *Davis* Court observed that the average federal civil servant receives a larger pension than his or her state counterpart but that there are individual instances in which the opposite holds true. *Davis*, 489 U.S. at 817.

Defendants then advance the language accompanying the quoted statement:

"A tax exemption truly intended to account for differences in retirement benefits would not discriminate on the basis of the source of those benefits, as Michigan's statute does; rather, it would discriminate on the basis of the amount of benefits received by individual retirees. *Cf. Phillips Chemical Co., supra,* at 384-385 (rejecting proffered rationale for State's unfavorable tax treatment of lessees of federal property, because *an evenhanded application of the rationale would have resulted in inclusion of some lessees of State property in the disfavored class as well).*" (Emphasis added.) *Davis,* 489 U.S. at 817.

Defendants contend that the differences between the two classes, those receiving federal military retirement benefits and those receiving state and local government retirement benefits, are common to all members of each class. Thus, an evenhanded application of the rationale for taxing all members of one class (military retirees) does not result in taxation of some members of the other class (state and local government retirees).

We agree with this interpretation of *Davis*. All persons receiving federal military retirement benefits receive current compensation while all persons receiving state and local government retirement benefits receive deferred compensation. The fact that KITA exempts federal civil service retirement benefits and federal railroad retirements benefits is further evidence that KITA taxation of federal military retirement benefits is not based on the federal government source.

Other Federal Retirees

Taxpayers also assert inconsistent tax treatment of retirement benefits of other federal retirees. For example,

federal retirement systems for members of the CIA, Foreign Service, bankruptcy judges, and United States magistrates are all contributory, yet these classes of federal retirees are subject to Kansas income tax. Similarly, retirement benefits received by retired members of the Public Health Service (PHS) and the National Oceanic and Atmospheric Administration (NOAA) are taxed under KITA. However, retirement benefits received under federal civil service retirement or by retired railroad employees are exempt. K.S.A. 1990 Supp. 79-32,117(c)(vii) and (viii). Taxpayers argue that these differences indicate no rhyme or reason for the disparate tax treatment.

Defendants assert that it is inappropriate to look at other federal retirement benefits, arguing that the justifications for taxing other federal retirement benefits do not affect whether the taxation of military retirement benefits are directly related to the differences between military retirees and state and local government retirees. The legal interests of other federal retirees are not at issue in this appeal. The justifications for taxing these federal retirement benefits should be addressed if and when they are challenged and properly before the court.

As pointed out by taxpayers, military retirement benefits are unique in comparison to other federal retirement benefits. If another class of federal retirees had exactly the same characteristics as the class of military retirees and was taxed differently, that fact would be relevant. However, absent such a circumstance, such comparisons are not helpful given the uniqueness of the military retirement system.

Finally, taxpayers argue that inconsistent tax treatment is not *justified by* significant differences between the two classes. They contend that the noncontributory funding of military retirement benefits does not justify differential tax treatment and military retirement pay cannot be characterized as reduced compensation for reduced current services to justify inconsistent taxation.

The resolution of the primary issue in this appeal depends on our agreement with, and acceptance of, the rationale of the federal cases holding that military retirement pay is reduced current compensation for reduced current services.

Several state courts have rejected the contention that military retirement pay is reduced compensation for reduced current services. These courts have held that military retirement pay is realistically viewed as deferred compensation. *In re Marriage of Fithian*, 10 Cal. 3d 592, 111 Cal. Rptr. 369, 517 P.2d 449, *cert. denied*, 419 U.S. 825 (1974); *In re Marriage of Gallo*, 752 P.2d 47, 52-54 (Colo. 1988); *In re Marriage of Howell*, 434 N.W.2d 629, 632 (Iowa 1989); *United States v. Miranda*, 581 S.W.2d 711, 711-12 (Tex. Civ. App. 1979); and *Greene v. Greene*, 751 P.2d 827, 830-31 (Utah App. 1988), *cert. denied* 765 P.2d 1278 (Utah 1988).

A state is justified in taxing reduced current compensation paid for reduced current services while not taxing deferred compensation. We agree with, and accept, the rationale of the federal cases.

The Post-*Davis* Cases

Davis has generated litigation in states which taxed federal retirement benefits while exempting state and local government benefits. See *Bohn v. Waddell*, 164 Ariz. 74, 790 P.2d 772 (T.C. 1990), *aff'd on reconsideration* 82 Ariz. Adv. Rep. 52, 807 P.2d 1 (T.C. 1991); *Pledger v. Bosnick*, ___ Ark. ___, ___ S.W.2d ___ (No. 90-39, filed June 10, 1991); *Hackman v. Director of Revenue*, 771 S.W.2d 77 (Mo. 1989), *cert. denied* 107 L. Ed. 2d 738 (1990); *Ragsdale v. Dept. of Rev.*, 11 Or. T. R. 440 (1990); *Bass v. State*, ___ S.C. ___, 395 S.E.2d 171 (1990), *vacated and remanded* ___ U.S. ___ (1991); *Harper v. Virginia Department of Taxation*, 241 Va. 232, 401 S.E.2d 868, *vacated and remanded* ___ U.S. ___, 59 U.S.L.W. 3772 (1991); *Hogan v. Musolf*, 157 Wis. 2d 362, 459 N.W.2d 865 (Ct. App. 1990), *rev'd* ___ Wis. 2d ___, ___ N.W.2d ___ (June 26, 1991).

Bohn was a suit brought by five plaintiffs – two retired United States military retirees, one United States civil service retiree, and two spouses of the military retirees. Arizona's tax scheme started with federal adjusted gross income and provided a deduction for all benefits received from Arizona state retirement systems. Only a $2,500 deduction was provided for benefits received from the United States civil service retirement system. No deduction was provided for military retirement benefits. Shortly after *Davis*, the Arizona legislature amended its income tax laws to give all state and federal pensioners a $2,500 deduction. The Arizona Tax Court in *Bohn* declared the prior Arizona tax scheme unconstitutional. The tax court stated: "The income tax treatment of state and federal pensions cannot be equal if the treatment of all federal pensions is not the same." 164 Ariz. at

82. Aside from this statement, *Bohn* provides little helpful analysis for the case at bar. There is no mention of any argument advanced by Arizona to uphold the disparate treatment of military retirees. In light of the legislative action, it appears that the Arizona legislature believed that federal civil service retirees are similarly situated to federal military retirees.

In *Hackman*, plaintiffs were a federal military retiree and his spouse. The Missouri scheme started with federal AGI. The scheme allowed deductions for retirement benefits received from state and local government retirement systems while allowing no deductions for retirement benefits from nonstate retirement plans. The court stated: "4 U.S.C. § 111 draws no distinction between federal military personnel; nor shall we draw such a distinction." 771 S.W.2d at 80. However, the Missouri Director of Revenue conceded that Missouri's taxation scheme offended 4 U.S.C. § 111 under *Davis*.

In *Ragsdale*, a federal pensioner brought the action to challenge Oregon tax laws which exempted pensions of state and local employees while taxing pensions of federal employees. The Oregon Tax Court found that Oregon's tax provisions came within the *Davis* holding. *Ragsdale* did not involve military retirees and provides little assistance on this issue.

Following *Davis*, South Carolina amended its tax laws to comply with *Davis*. *Bass*, ___ S.C. at ___, 395 S.E.2d at 172. The only issue in *Bass* was whether *Davis* should apply retrospectively.

Harper was a challenge by federal civil service retirees and federal military retirees who sought refunds

for taxes paid on the tax years of 1985-1988. The only issue before the court was whether *Davis* should apply prospectively. Virginia's General Assembly amended its tax statutes to comply with *Davis*.

Hogan was a class action brought by federal retirees following *Davis*. The Wisconsin legislature amended its tax statute to comply with *Davis* for tax years beginning in 1988. Because *Hogan* did not involve military retirees and because Wisconsin amended its statute to comply with *Davis*, *Hogan* is not helpful.

In *Pledger*, the Arkansas Supreme Court reviewed a class action certification issue. The Arkansas class certified by the lower court consisted of three groups of retired Arkansas residents from: (1) various United States civil service agencies; (2) various branches of the United States armed services; and (3) the agencies and political subdivisions of other states. A question on appeal was the propriety of including military retirees and retirees from other states in the certified class. The Arkansas Supreme Court affirmed the inclusion of both groups. The *Pledger* court relied on three of its own divorce case opinions in reasoning "that those cases which hold that military pay is actually deferred compensation or in the nature of a pension represent the better reasoned application law." Slip Op. at 10. No mention is made of *Tyler*, *McCarty*, *Cornetta*, *Tafoya*, *Costello*, or *Siverling*.

Of the post-*Davis* cases, *Bohn*, *Hackman*, and *Pledger* reasoned that civil service retirees and military retirees should be treated alike.

In our view, the district court in the case at bar was justified in relying on federal precedents.

The Kansas Constitution

Without discussion or explanation, the trial court concluded that KITA does not offend Article 11, § 2 of the Kansas Constitution. Apparently, the trial court based this holding on the same reasoning used to reject taxpayers' challenge under *Davis*.

Article 11, § 2 prohibits the State from levying or collecting income taxes based upon classifications which are arbitrary, capricious, and discriminatory. A discriminatory tax must have a reasonable relationship to the subject of the right and privilege taxed. *Hartman v. State Commission of Revenue and Taxation*, 164 Kan. 67, 77-78, 187 P.2d 939 (1947). Nothing forbids different taxation of different classes where there is a reasonable basis for differentiation. See *Missouri Pacific Railroad Co. v. McDonald*, 207 Kan. 744, 752, 486 P.2d 1347 (1971).

Taxpayers contend, as demonstrated by their arguments on intergovernmental tax immunity, that KITA artificially, unnaturally, and irrationally discriminates in favor of state and local government retirees and federal civil service retirees against federal military retirees solely on the basis of the source. Taxpayers assert that, because all such retirees belonging to the same class of public sector retirees, the unequal tax burden does not have a reasonable relation to the subject matter.

Defendants correctly point out that the standard of review under Article 11, § 2 of the Kansas Constitution is a more lenient standard than that mandated in *Davis*. Under *Davis*, the discriminatory tax must be directly related to and justified by significant differences between the classes. Under Article 11, § 2, the discriminatory tax

must bear a reasonable relationship to the subject taxed. Defendants argue that the State has a legitimate purpose in providing a orderly means whereby state and local employees may retire without hardship (to enable employees to provide for old age and to effect economy and efficiency of government affairs). A tax exemption for state and local government employees is rationally related to this purpose. Further, the State has a "rational reason" for discriminating between state and federal retirees when it seeks to advance its interest in hiring and retaining qualified employees.

We have held KITA constitutional under principles of intergovernmental tax immunity. It is constitutional under Article 11, § 2 of the Kansas Constitution. The discriminatory tax bears a reasonable relationship to the subject taxed. The tax is not arbitrary or capricious.

Having held KITA to be constitutional, we need not address the remaining issues raised by the taxpayers.

Affirmed.

McFarland and Herd, JJ., not participating.

Michael J. Malone and Dean J. Smith, District Judges assigned, participating.

APPENDIX B

IN THE DISTRICT COURT OF
SHAWNEE COUNTY, KANSAS
DIVISION FOUR

KEYTON BARKER and PAULINE BARKER, et al., Plaintiffs, and ANTHONY E. CORCORAN, et al., Intervenor/Plaintiff, vs. STATE OF KANSAS, et al., Defendants.	)	No. 89-CV-666 (CONSOLIDATED)
WILLIAM J. LOBER, JR. and MARJORIE E. LOBER, et al., Plaintiffs, vs. STATE OF KANSAS, DEPARTMENT OF REVENUE, Defendants.	)	No. 89-CV-1100

MEMORANDUM DECISION AND ORDER

This matter comes before the Court on plaintiff's motion for summary judgment on the issue of liability. The defendants have responded to plaintiffs' motion and have also moved for summary judgment on the issue of whether the defendants can be held liable under 42 U.S.C. § 1983.

All named plaintiffs served at least twenty (20) years in the United States Armed Forces which include the Army, Navy and Air Force. They have been noncommissioned and commissioned officers. All named plaintiffs are Kansas residents who have paid and continue to pay Kansas income taxes. Named plaintiffs represent a certified class of approximately 14,000 federal military retirees in the State of Kansas. *Journal Entry* at 3, para. 4 (Dec. 19, 1989).

Plaintiffs brought this action challenging the Kansas Income Tax Act (KITA) (K.S.A. § 79-3201 *et seq.*) claiming it discriminates against federal military retirees and therefore, is unconstitutional because it violates 4 U.S.C. § 111 and the Supremacy Clause of the United States Constitution, the constitutional doctrine of intergovernmental tax immunity, the Privileges and Immunities Clause of the Fourteenth Amendment, and article XI, § 2 of the Kansas Constitution. *Second Amended Petition* at 9 & 11 (Sept. 22, 1989). Plaintiffs allege defendants deprived plaintiffs of their civil rights in violation of the United States Constitution, the Fourteenth Amendment and 42 U.S.C. § 1983. *Id.* at 10.

Plaintiffs also request a refund of Kansas income taxes since 1984, with interest, which are allegedly overpayments. *Id.* at 13. Plaintiffs have preserved their right to a refund by the order of this Court which recognized that plaintiffs could not receive the relief sought from the administrative process due to the Kansas Department of Revenue's inability to declare a state statute unconstitutional. *Journal Entry* at 5-6, para. 2 & 3 (Dec. 19, 1989).

CONCLUSIONS OF LAW

Federal income tax is based upon the taxpayer's federal adjusted gross income pursuant to provisions of the Internal Revenue Code. *See* 26 U.S.C. §§ 61 to 134. Federal adjusted gross income includes federal military retired pay, federal civil service retirement pay and retirement benefits paid to the States' civil service retirees, such as retired members of the Kansas Public Employees Retirement Systems.

Kansas income tax is based upon the taxpayer's Kansas adjusted gross income. An individual's federal adjusted gross is modified pursuant to K.S.A. § 79-32,117 to calculate his Kansas adjusted gross income. To arrive at an individual's Kansas adjusted gross income, his federal adjusted gross income is reduced by the amount received from the federal civil service retirement and disability fund, amounts received by retired railroad employees as a supplemental annuity, and amounts received from the Kansas Employee Retirement Systems by retired members. K.S.A. §§ 79-32,117(c) (1989) and 74-4924 (1985). The Kansas adjusted gross income includes the amount received from military retired pay and therefore, military retirees pay taxes on military retired pay. *See* K.S.A. § 79-32,117 (1989).

Plaintiffs brought this action challenging the Kansas Income Tax Act and request tax refunds as a response to the United States Supreme Court decision in *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989). In *Davis*, the plaintiff, a retired Federal Government employee receiving federal civil service retirement benefits, challenged the Michigan state income

tax. The Michigan state income tax act taxed federal civil service retirement benefits while exempting state civil service retirement benefits. Therefore, the plaintiff claimed the Michigan income tax scheme was unconstitutional under the doctrine of intergovernmental tax immunity and 4 U.S.C. § 111.

The doctrine of intergovernmental tax immunity has its roots in *McCulloch v. Maryland*, 4 Wheat 316, 4 L.Ed. 579 (1819), which held a state could not impose a discriminatory tax on an agent of the United States and thereby, indirectly tax the Federal Government. This doctrine was more fully developed in *Helvering v. Gerhart*, 304 U.S. 405, 58 S.Ct. 969, 82 L.Ed. 1427 (1938), and in *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 59 S.Ct. 595, 83 L.Ed. 927 (1939). In *Helvering* the Supreme Court held that the Federal Government could levy nondiscriminatory taxes on the incomes of most state employees. The Supreme Court in *Graves* held federal employees were subject to nondiscriminatory taxes levied by the States. "After *Graves*, therefore, intergovernmental tax immunity barred only those taxes that were imposed directly on one sovereign by the other or that discriminated against a sovereign or those with whom it dealt." *Davis*, 103 L.Ed.2d at 902.

The principle of allowing States to tax the Federal Government "or those with whom it dealt" as long as the tax did not discriminate against the Federal Government was codified in part by 4 U.S.C. § 111. This statute was passed between the announcements of *Helvering* and *Graves* and states in pertinent part "[t]he United States consents to the taxation of pay or compensation for personal services as [a federal employee], . . . , by a duly

constituted taxing authority having jurisdiction, *If the taxation does not discriminate* against the officer or employee *because of the source* of the pay or compensation." (Emphasis added). After determining that 4 U.S.C. § 111 applies to retired as well as current federal employees, the Supreme Court in *Davis* states "the relevant inquiry is whether the inconsistent tax treatment is directly related to and justified by 'significant differences between the two classes.' " *Davis*, 103 L.Ed.2d at 905 (citing *Phillips Chemical Co. v. Dumas Independent School Dist.*, 361 U.S. 376, 383, 80 S.Ct. 474, 4 L.Ed.2d 384 (1960)).

Michigan raised the defenses of the State's interest in attracting employees by favoring its employees through tax benefits and the fact that as a general rule Federal Government retirees receive greater retirement benefits than Michigan's civil service retirees. The Supreme Court held these differences did not prove a substantial difference between the two classes which would justify a discriminatory tax treatment. *Davis*, 103 L.Ed.2d at 905-06. There are equal protection problems with the first argument. Additionally, if Michigan wished to tax retirees receiving high retirement benefits then the State's tax would be based on amount rather than source. Therefore, the United States Supreme Court declared the Michigan income tax statute unconstitutional. *Davis*, 103 L.Ed.2d at 906.

Unfortunately the *Davis* case does not provide any further guidance on what would amount to "significant differences" which justifies different tax treatment. This Court must start with the presumption that the Kansas Income Tax Act (KITA) is constitutional. *Kansas Malpractice Victims Coalition v. Bell*, 243 Kan. 333, 340, 757 P.2d 251

(1988) (citing *Tri-State Hotel Co. v. Londerholm*, 195 Kan. 748, 408 P.2d 877 (1965)). In order to decide the issue currently before this Court, whether the KITA violates 4 U.S.C. § 111 and the doctrine of intergovernmental tax immunity, the Court must examine the military non-disability retired pay and compare it to the Kansas state employee retirement system. All branches of the Armed Forces are governed by similar provisions and therefore, for the sake of this analysis this Court will cite to the statutes which regulate the United States Army.

Title 10 of the United States Code includes several provisions which regulate Army retirees: (1) the Regular Army includes retired officers and enlisted men, 10 U.S.C. § 3075(b)(3); (2) retired officers of the Army may wear their uniform while not on active duty, 10 U.S.C. § 772(c); (3) any retired member of the Regular Army is subject to recall to active duty, 10 U.S.C. §§ 688(a) and 3504(a); (4) retired members of the Armed Forces who are entitled to pay are subject to the Uniform Code of Military Justice and court-martial jurisdiction, 10 U.S.C. §§ 802(a) and 817(a); (5) officers and enlisted men may retire after 20 years of service, *see e.g.*, 10 U.S.C. §§ 3911, 3914; (6) during their service, members of the Armed Forces do not make contributions to a retirement or pension fund from which their retired pay is later drawn, *McCarty v. McCarty*, 453 U.S. 210, 214, 101 S.Ct. 2728, 69 L.Ed.2d 589, 594 (1981); (7) military retirees may lose or have their retired military pay reduced if they become an employee of the federal civil service, 5 U.S.C. § 5532.

When considering this system of military retired pay, the United States Supreme Court concluded retired Army officers "are then by law a part of the army." *United States*

v. Tyler, 15 Otto 244, 105 U.S. 244; 26 L.Ed. 985 (1881). The Supreme Court further stated:

> It is impossible to hold that men who are by statute declared to be part of the army, who may wear its uniform, whose names shall be borne upon its register, who may be assigned by their superior officers to specified duties by detail as other officers are, . . . , are still *not* in the military service.

Tyler, 105 U.S. at 246, 26 L.Ed. at 986. (Emphasis in original).

The plaintiffs argue that *Tyler* should not bear on the outcome of this case because the decision is over one hundred years old. However, *Tyler* has never been overruled and was heavily relied upon in *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728, 69 L.Ed.2d 589 (1981). The plaintiff in *McCarty* argued his non-disability military retired pay for twenty (20) years of service in the U.S. Army should not be considered community property under California law for purposes of property distribution in his divorce proceedings. Overruling a decision by the California Court of Appeals, the United States Supreme Court agreed with the plaintiff. The Supreme Court concluded "that military retired pay is reduced compensation for reduced current services." *McCarty*, 69 L.Ed.2d at 599. The Court found the California community property law threatened grave harm to "clear and substantial" federal interests which gave the United States Supreme Court through the Supremacy Clause, U.S. Const., art. VI, cl. 2, authority to override the California law.

In contrast to the military retired pay system, the Kansas Public Employees Retirement Systems (KPERS) puts no requirements upon its retirees. The normal retirement age for a KPERS member is 65 years. K.S.A. § 74-4914(1) (Supp. 1989). Normal retirement may also occur at "age 60 with the completion of 35 years of credited service or at any age with the completion of 40 years credited service." *Id.* In order to receive any KPERS retirement benefits, the member must have worked at least 10 years and must be at least 55 years of age. K.S.A. § 74-4914(5) (Supp. 1989). If a KPERS member should opt to retire before age 65 the amount of the benefits will be lowered thereby penalizing early retirement. K.S.A. § 74-4915(2) (Supp. 1989). KPERS members pay 4% of their compensation or wage into the KPERS fund. This contribution is credited to the member's individual account with annual interest. K.S.A. § 74-4919(a) (1985). If the employer is the State of Kansas, the employer contributes 3.1% of the employee's wage to the employee's individual account. K.S.A. § 74-49205 (Supp. 1989). Other KPERS employers contribute 2% of the employee's wage. *Id.* These contributions, by the employee and employer, are made at the time of the worker's employment and are drawn from when the retirement benefits are paid out. Other than staying alive, no requirements or restrictions are placed on a retired KPERS members. *See* Kansas Public Employees Retirement Systems, K.S.A. § 74-4901 *et seq.*

After examining the military non-disability retired pay which is taxed by KITA and KPERS which is exempt from tax under KITA, this Court finds there are substantial differences between the two classes which justifies the disparate tax treatment. Therefore, this Court holds

the Kansas Income Tax Act is not unconstitutional nor in violation of 4 U.S.C. § 111. Viewed in toto the military retired system is unique to other retirement systems, especially in light of the fact that military retirees are subject to recall and during active service do not contribute to their retired pay. The absence of contribution during active service by military retirees or by their employer, the Federal Government, is consistent with the *Tyler* and *McCarty* decisions which state military retired pay is reduced compensation for reduced current services.

Plaintiffs argue that the characterization of military retired pay of *Tyler* and *McCarty* should not apply due to the enactment of the Uniform Services Former Spouses Protection Act, 10 U.S.C. § 1408 and its Kansas equivalent K.S.A. § 23-201(b). After the *McCarty* decision, Congress passed the Uniform Services Former Spouses Protection Act which permits States to treat military retired pay as marital property for purposes of marital dissolution. This enactment was a policy decision by Congress and designed to treat former spouses of military retirees more equitably. In 1987, Kansas amended its Married Persons Act to treat military retired pay as marital property for purposes of divorce, separate maintenance, and annulment. K.S.A. § 23-201 (1988). Prior to this amendment, Kansas had held that military retired pay was not marital property and was nothing more then a future stream of income which will cease at the death of the retiree. *Grant v. Grant*, 9 Kan. App. 2d 671, 676, 685 P.2d 327 (1984) (citing *Powell v. Powell*, 231 Kan. 456, 648 P.2d 218 (1982)).

This Court agrees with the defendants that while the Uniform Services Former Spouses Protection Act permitted States to treat military retired pay as marital property, it did not change the legal characterization of military retired pay for any other purpose. *See also Cornetta v. U.S.*, 851 F.2d 1372, 1382 n.3 (Fed. Cir. 1988) ("the legislation did not affect the characterization of military retired pay as reduced compensation for reduced current services"). Plaintiffs argue the Supremacy Clause applies to the case at bar and therefore, this Court must find the KITA unconstitutional under *Davis* and 4 U.S.C. § 111. Certainly the Supremacy Clause applies, however, this Court finds that due to the United States Supreme Court's characterization of military retired pay as reduced compensation for reduced current services the KITA must be found constitutional.

Plaintiffs have also brought to the attention of this Court decisions from other state courts which have addressed actions brought by military retirees resulting from the *Davis* decision. *See e.g., Hackman v. Director of Revenue*, 771 S.W.2d 77 (*cert. denied* 110 S.Ct. 718) (Mo. banc 1989); *Bohn v. Waddell*, 164 Ariz. 74, 790 P.2d 772 (1990). These decisions, which held various States taxation of military retired pay was unconstitutional, are not controlling and this court is not persuaded by them.

The Court has considered all other issues raised by the parties and finds them to be without merit.

CONCLUSION

The Court finds the Kansas Income Tax Act to be constitutional. Plaintiffs' Motion for Summary Judgment on the Question of Liability is denied.

This action does not involve a genuine issue as to any material fact and therefore, the Court grants summary judgment to the defendants on its own motion. *Phillips v. Carson*, 240 Kan. 462, syl. 3, 731 P.2d 820 (1987).

In light of the findings of the Court, defendants' request for summary judgment on the issue of whether the defendants can be held liable under 42 U.S.C. § 1983 is moot.

This Memorandum Decision and Order shall serve as the Journal entry.

Dated this 31st day of October, 1990.

/s/ Adrian J. Allen
ADRIAN J. ALLEN
JUDGE OF THE
DISTRICT COURT

APPENDIX C

EXCERPTS OF RELEVANT KANSAS STATUTES ANNOTATED

Kansas Income Tax Act

SECTION 79-3201: "The title of this act shall be 'Kansas income tax act.' "

SECTION 79-32,116: "The Kansas taxable income of an individual shall be his or her Kansas adjusted gross income less his or her Kansas deductions and Kansas personal exemptions."

SECTION 79-32,117 (Supp. 1990): "(a) The Kansas adjusted gross income of an individual means such individual's federal adjusted gross income for the taxable year, with the modifications specified in this section.

(b) There shall be added to federal adjusted gross income:

* * *

(vi) Any amount of designated employee contributions picked up by an employer pursuant to K.S.A. 12-5005, 20-2603, 74-4919 and 74-4965, and amendments to such sections.

(c) There shall be subtracted from federal adjusted gross income:

* * *

(ii) Any amounts received which are included in federal adjusted gross income but which are specifically exempt from Kansas income taxation under the laws of the state of Kansas.

* * *

(vii) Amounts received as annuities under the federal civil service retirement system, from the civil service retirement and disability fund.

(viii) Amounts received by retired railroad employees as a supplemental annuity under the provisions of 45 U.S.C. 228b(a) and 228c(a)(1) *et seq.*

(ix) Amounts received by retired employees of a city and by retired employees of any board of such city as retirement allowances pursuant to K.S.A. 13-14,106, and amendments thereto, or pursuant to any charter ordinance exempting a city from the provisions of K.S.A. 13-14,106, and amendments thereto.

* * *

(xiii) For taxable years beginning after December 31, 1989, amounts received by retired employees of a board of public utilities as pension and retirement benefits pursuant to K.S.A. 13-1246, 13-1246a and 13-1249 and amendments thereto."

Kansas Public Employees Retirement System

SECTION 74-4901: "The purpose of this act is to provide an orderly means whereby employees of the participating employers who have attained retirement age as herein set forth may be retired from active service without prejudice and without inflicting a hardship upon the employees retired and to enable such employees to accumulate reserves for themselves and their dependents to

provide for old age, death and termination of employment, and for the purpose of effecting economy and efficiency in the administration of governmental affairs."

SECTION 74-4914 (Supp. 1990): "(1) The normal retirement date for a member of the system shall be the first day of the month coinciding with or following the attainment of age 65 or, commencing July 1, 1986, age 65 or age 60 with the completion of 35 years of credited service or at any age with the completion of 40 years of credited service. In no event shall a normal retirement date for a member be before six months after the entry date of the participating employer by whom such member is employed. A member may retire on the normal retirement date or on the first day of any month thereafter upon the filing with the office of the retirement system of an application in such form and manner as the board shall prescribe. Nothing herein shall prevent any person, member or retirant from being employed, appointed or elected as an employee, appointee, officer or member of the legislature. Elected officers may retire from the system on any date on or after the attainment of the normal retirement date, but no retirement benefits payable under this act shall be paid until the member has terminated such member's office."

SECTION 74-4915 (Supp. 1990): "(1) Any member who retires on or after such member's normal retirement date shall be entitled to receive an annual retirement benefit equal to the sum obtained by adding an amount for participating service and an amount for prior service determined as provided in this section. The amount for prior service shall be equal to 1% of the member's prior service annual salary multiplied by the number of years

of prior service entitled to credit as provided in K.S.A. 74-4913 and amendments thereto, except that for members retiring or after July 1, 1981, who were last employed by a participating employer which had affiliated with the system under K.S.A. 74-4910, 74-4912, 74-4929 or 74-4991 and amendments thereto, and for the period commencing January 1, 1986, for members retiring before July 1, 1981, who were last employed by a participating employer which had affiliated with the system under K.S.A. 74-4910, 74-4912, 74-4929 or 74-4991 and amendments thereto, except that any increase in benefits under this section shall be reduced by any postretirement benefit adjustments received by such member prior to July 2, 1985, the amount for prior service shall be calculated using final average salary in lieu of prior service annual salary and, in the case of any such member who became a member under subsection (3) of K.S.A. 74-4925 and amendments thereto and for whom a final average salary cannot be otherwise determined, such member's final average salary shall be based on all service for which such member received assistance in a plan under subsection (2) of K.S.A. 74-4925 and amendments thereto as certified by such employer upon request of the board. The amount for participating service shall be equal to the total of 1.25% of the member's final average salary multiplied by the number of years of participating service prior to July 1, 1982, which are entitled to credit as provided in K.S.A. 74-4913 and amendments thereto and 1.4% of the member's final average salary multiplied by the number of years of participating service after June 30, 1982, which are entitled to credit as provided in K.S.A. 74-4913 and amendments thereto."

SECTION 74-4919h (Supp. 1990): "(1) In addition to any military service credited under the provisions of K.S.A. 74-4913 or 74-4936 and amendments thereto, or in the event that an active contributing member does not qualify for credit for military service as defined in subsection (22) of K.S.A. 74-4902 and amendments thereto, such member may purchase participating credit for periods of active service in the armed forces of the United States and for periods of service required to fulfill the requirements of section 651 of title 10, United States code, which are not otherwise creditable, which when added to any creditable military service do not exceed six years and which are not the basis for military pension rights. Such member shall be entitled to purchase one quarter of participating service credit for each year of service required to fulfill the requirements of section 651 of title 10, United States code. Such purchase shall be effected by the member submitting proof of such service acceptable to the board and electing in writing to have employee contributions as provided in K.S.A. 74-4919 and amendments thereto deducted at 8% or 12% of such member's compensation. Such deductions shall commence at the beginning of the quarter following such election and shall remain in effect until all of the full quarters of such service have been purchased."

SECTION 74-4923 (Supp. 1990): "(b) Any annuity, benefits, funds, property or rights created by, or accruing to any person under the provisions of K.S.A. 74-4901 *et seq.* or K.S.A. 74-4951 *et seq.* and any acts amendatory thereof or supplemental thereto, shall be exempt from any tax of the state of Kansas or any political subdivision or taxing

body of the state; shall not be subject to execution, garnishment or attachment, or any other process or claim whatsoever, including decrees for support, except such annuity or benefit or any accumulated contributions due and owing from the system to such person are subject to decrees for support. The Kansas public employees retirement system shall not be a party to any action under article 16 of chapter 60 of the Kansas Statutes Annotated and is subject only to orders from such actions issued by the district court of Shawnee county. The system shall satisfy its obligation by making payments otherwise due to such person in care of the clerk of the Shawnee county district court. All distributions shall be made by the clerk and the system has no further liability upon delivery of the benefit or benefits to the clerk of the district court; and shall be unassignable, except as specifically provided by this act."

SECTION 74-4925 (Supp. 1990): "(1) The state board of regents shall: (a) Assist all those members of the faculty and other persons who are employed by the state board of regents or by educational institutions under its management and who are in the unclassified service under the Kansas civil service act as provided in subsection (1)(f) of K.S.A. 75-2935 and amendments thereto, in the purchase of retirement annuities for their service rendered after December 31, 1961. . . .

* * *

(4) For the purpose of establishing a procedure whereby the state board of regents and any member of the faculty or other person described in subsection (1)(a) . . . may take advantage of section 403(a) or (b) of

the federal internal revenue code of 1986 or any other section of the federal internal revenue code of 1986 which defers or excludes amounts from inclusion of income, any member of the faculty or any other person described in subsection (1)(a) . . . may request in writing that the state board of regents reduce such person's annual salary . . . in an amount equal to not less than 5% nor more than the percentage allowed under section 403(b) of the federal internal revenue code of 1986, as designated by such member of the faculty or other person described in subsection (1)(a), of the gross amount of such annual salary. In the event of such request by a faculty member or other person who is required to make the contribution as provided in subsection (1)(b), such person shall not be required to make such contribution and the state board of regents shall provide a sum equal to the percentage amount, as prescribed by K.S.A. 1988 Supp. 74-4925e and amendments thereto, of the gross annual salary of the member of the faculty or other person and shall purchase for and on behalf of each such person whose salary has been so reduced a retirement annuity contract or contracts, the annual premiums for which shall be equal to the sum of the amount of the salary reduction of the member of the faculty or other person and the amount paid by the state board of regents."

SECTION 74-4955a (Supp. 1990): "(1) Except as provided in subsection (4), each member of the system who was appointed or employed prior to July 1, 1989, may elect to be covered by the provisions of K.S.A. 1989 Supp. 74-4957a, 74-4958a, 74-4960a, 74-4963a and 74-4964a, and amendments thereto, on the first day of the first payroll period of such member coinciding with or following the

receipt of such election in the office of the retirement system, only by filing with the board of trustees of the system prior to January 1, 1990, a written election to be covered by such provisions. Failure to file such written election shall be presumed to be an election not to be covered by such provisions. Such election, whether to become a member or not to become a member, shall be irrevocable."

SECTION 74-4957 (Supp. 1990): "(1) The normal retirement date for a member of the system who is appointed or employed prior to July 1, 1989, and who does not make an election pursuant to K.S.A. 1989 Supp. 74-4955a shall be the first day of the month coinciding with or following the attainment of age 55 and the completion of 20 years of credited service. Any member may retire on such member's normal retirement date or on the first day of any month thereafter.

* * *

(3) The provisions of subsections (1) and (2) of this section and K.S.A. 1989 Supp. 74-4955a, 74-4957a, 74-4958a, 74-4960a, 74-4963a and 74-4964a notwithstanding, the normal retirement date for any member who was, up to the entry date of such member's employer, covered by a pension system under the provisions of K.S.A 13-14a01 to 13-14a14, inclusive, or 14-10a01 to 14-10a15, inclusive, and amendments thereto, shall be the first day of the month coinciding with or following the attainment of age 50 and the completion of 25 years of credited service."

SECTION 74-4958 (Supp. 1990): "(1) Any member who retires on or after such member's normal retirement date

shall be entitled to receive an age and service retirement benefit equal to 2% of such member's final average salary multiplied by the number of years of credited service except that in no case shall such retirement benefit exceed 70% of such member's final average salary."

SECTION 74-4978g (Supp. 1990): "Any person receiving or entitled to receive a pension or any other benefit, or who will become entitled to receive a pension or any other benefit, from the state highway patrol pension fund as it existed prior to April 1, 1972, shall be entitled to receive from the Kansas police and firemen's retirement system such pension or any other benefit to the same extent and subject to the same conditions as existed on April 1, 1972 . . . . All pensions and benefits received by any person under this act are hereby made and declared exempt from any tax of the state of Kansas or any political subdivision or taxing body thereof, and shall not be subject to execution, garnishment, or attachment, or any other process or claim whatsoever."

SECTION 74-49,105: "Every retirement benefit received by any person under subsection (b) of K.S.A. 74-49,104 shall be exempt from any tax of the state of Kansas or any political subdivision or taxing body of the state; shall not be subject to execution, garnishment, attachment or any other process or claim whatsoever, including decrees for support or maintenance; and shall be unassignable."

Local Retirement Systems for Police Officers and Firemen

SECTION 12-111a: "All annuities, pensions and benefits paid, which arise from service of a policeman or

fireman, by a pension and benefit plan of a city of the first or second class under a charter ordinance related to K.S.A. 13-14-10a01 *et seq.* or K.S.A. 1410a01 *et seq.* are hereby made and declared exempt from any tax of the state of Kansas or any political subdivision or taxing body thereof and shall not be subject to execution, garnishment or attachment."

SECTION 12-5005 (Supp. 1990): "(d) Each retired member of a local police or fire pension plan who becomes a special member of the Kansas police and firemen's retirement system under this section shall be entitled to receive from the Kansas police and firemen's retirement system a pension or other benefit to the same extent and subject to the same conditions as existed under the local police and fire pension plan on the day immediately preceding the entry date of the city which is affiliating with the system with regard to all active members and retired members of the plan under K.S.A. 74-4954 and amendments thereto, except no retired special member shall be appointed in or to a position or office for which compensation is paid for service to the same state agency, or the same police or fire department of a city, township, special district or county or the same sheriff's office of a county. This subsection shall not apply to service rendered by a retiree as a juror, as a witness in any legal proceeding or action, as an election board judge or clerk or in any other office or position of a similar nature. Any retiree employed by a participating employer in the Kansas police and firemen's retirement system shall not make contributions or receive additional credit under the system for that service. This subsection, except as it relates to contributions and additional credit, shall not apply to the employment of any

retiree by the state of Kansas, or any county, city, township, special district, political subdivision or instrumentality of any one or several of the aforementioned for a period of not exceeding 30 days in any one calendar year."

(e) Every pension or other benefit received by any special member pursuant to subsection (c) or (d) is hereby made and declared exempt from any tax of the state of Kansas or any political subdivision or taxing body of this state; shall not be subject to execution, garnishment, attachment or any other process or claim whatsoever, including decrees for maintenance except such pension or benefit or any accumulated contributions due and owing from the system to such special member are subject to decrees for support."

SECTION 13-14a10: "Any annuity, benefits, funds, property, or rights created by or accruing to any person under the provisions of K.S.A. 13-14a01 *et seq.* or K.S.A. 14-10a01 *et seq.* and any acts amendatory thereof or supplemental thereto are hereby made and declared exempt from any tax of the state of Kansas or any political subdivision or taxing body thereof, and shall not be subject to execution, garnishment, or attachment, or any other process or claim whatsoever, and shall be unassignable, except as specifically provided by law."

SECTION 14-10a10: "Any annuity, benefits, funds, property, or rights created by or accruing to any person under the provisions of K.S.A. 13-14a01 *et seq.* or K.S.A. 14-10a01 *et seq.* and any acts amendatory thereof or supplemental thereto are hereby made and declared exempt from any tax of the state of Kansas or any political

subdivision or taxing body thereof, and shall not be subject to execution, garnishment, or attachment, or any other process or claim whatsoever, and shall be unassignable, except as specifically provided by law."

Retirement System for State Judges

SECTION 20-2618 (Supp. 1990): "Every annuity or other benefit received by any judge or other person pursuant to the retirement system for judges under the acts contained in article 26 of chapter 20 of the Kansas Statutes Annotated and acts amendatory thereof or supplement thereto is exempt from any tax of the state of Kansas or any political subdivision or taxing body thereof; shall not be subject to execution, garnishment, attachment or any other process or claim whatsoever, including decrees for maintenance except such annuity or other benefit or any accumulated contributions due and owing from the system to such judge are subject to decrees for support."

Retirement System for School Employees

SECTION 72-1768a: "No school annuities paid under this act [*] shall be subject to taxation under the Kansas income tax act."

SECTION 72-17,122: "Any retirement benefits paid under the provisions of this act and acts to which this act is amendatory, shall not be subject to taxation under the Kansas income tax act."

The Kansas Married Persons Act

SECTION 23-201: "(a) The property, real and personal, which any person in this state may own at the time of the person's marriage . . . shall remain the person's sole and separate property, notwithstanding the marriage, and not be subject to the disposal of the person's spouse or liable for the spouse's debts.

(b) All property owned by married persons, including the present value of any vested or unvested military retirement pay, whether described in subsection (a) or acquired by either spouse after marriage, and whether held individually or by the spouses in some form of co-ownership, such as joint tenancy or tenancy in common, shall become marital property at the time of commencement by one spouse against the other of an action in which a final decree is entered for divorce, separate maintenance, or annulment. Each spouse has a common ownership in marital property which vests at the time of commencement of such action, the extent of the vested interest to be determined and finalized by the court, pursuant to K.S.A. 60-1610 and amendments thereto.

History: G.S. 1868, ch. 62, § 1; R.S. 1923, 23-201; L. 1976, ch. 172, § 1; L. 1978, ch. 134, § 1; L. 1981, ch. 159, § 1; L. 1987, ch. 120, § 1; July 1."

EXCERPTS OF RELEVANT KANSAS ADMINISTRATIVE REGULATIONS (1989) RELATING TO THE KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM

SECTION 80-3-16: "For the purposes of purchasing participating service credit under K.S.A. 1974 Supp. 74-4919h active service in the armed forces shall not include

periods of active duty for training. . . . If a member has purchased participating service credit for military service under K.S.A. 1974 Supp. 74-4919h and at the time of retirement is receiving or will become eligible to receive a military longevity pension based in part on the years of service for which participating service credit has been purchased the member shall be refunded the amount of money contributed for such purchase plus interest at a rate specified by the board and any credit granted for such service shall be forfeited. (Authorized by K.S.A. 74-4909; effective, E-74-38, July 2, 1974; effective May 1, 1975.)"

SECTION 80-5-2: "If a retirant returns to public employment, office or position as contemplated by K.S.A. 74-4914(2) for which compensation is paid, he shall receive no retirement benefits for any month during which he serves any period of time in such office except as provided in said section. (Authorized by K.S.A. 74-4909; effective Jan. 1, 1966.)"